A Panoramic IDEA: Cabining the Snapshot Rule in Special Education Disputes

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In special education disputes, post-hoc evidence—i.e., evidence that was not available to a school district at the time it acted, failed to act, or made the decision at issue—matters. For many families of children with disabilities, post-hoc evidence is the primary and, in some cases, only proof that a school district violated the Individuals with Disabilities Education Act ("IDEA"), which guarantees students with disabilities the right to a free and appropriate public education. Exclusion of this evidence deprives children with disabilities and their parents of their due process rights and remedies, with disproportionate adverse effects on families with limited financial means. Despite the critical function that post-hoc evidence plays in demonstrating an IDEA violation, some circuits bar its consideration in certain types of special education disputes via the judicially created "Snapshot Rule." Most recently, in a divided, precedential decision in J.M. v. Summit City Board of Education*, the U.S. Court of Appeals for the Third Circuit held that, under the Snapshot Rule, courts may, and perhaps even must, summarily exclude post-hoc evidence from consideration in cases where a school district's duty to locate, identify, evaluate, and determine the eligibility of children with disabilities is at issue. This decision extended precedent from the Fifth and Ninth Circuits to effectively require reviewing courts to completely disregard post-hoc evidence offered to prove a school district wrongfully failed to evaluate a student with a disability, performed an inadequate evaluation, or incorrectly found a student ineligible under the IDEA.*

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This Article posits that courts' application of the Snapshot Rule to the child find and eligibility contexts contravenes the IDEA's language, intent, and purpose; Supreme Court precedent interpreting the Act; and principles of procedural due process and fundamental fairness. It proposes the adoption of an alternate standard that allows for broad consideration of post-hoc evidence in child find and eligibility matters, subject to limitations set forth in generally applicable rules of evidence, while preventing courts from giving undue weight to hindsight. The Article further urges that, until courts adopt the recommended standard, the IDEA or federal special education regulations should be amended to define the terms "evidence" and "additional evidence" as including post-hoc evidence. These changes are necessary to safeguard the due process rights of, and remedies for, children with disabilities wrongfully denied an appropriate education, and are consistent with, if not compelled by, the IDEA's core purpose and broad remedial scope.

INTRODUCTION

In 1975, Congress enacted the Education of All Handicapped Children Act ("EAHCA"),[1] now known as the Individuals with Disabilities Education Improvement Act ("IDEA" or "Act"), to provide equality in educational opportunity to children with disabilities.[2] This landmark civil rights legislation sought to end the United States' long and shameful history of denying school-based accommodations and assistance to children with disabilities; "warehousing" children with disabilities in institutions or otherwise segregating them from their non-disabled peers; and depriving them of an education altogether.[3]

The IDEA aims to ensure that all children with disabilities receive a free and appropriate public education ("FAPE").[4] It grants extensive educational rights and procedural safeguards to children with disabilities and their parents,[5] and confers broad remedial authority upon the courts when school districts violate the Act.[6] The IDEA has resulted in significant improvements in the education of students with disabilities by providing them the opportunity, through special education programming and services, to make meaningful educational progress commensurate with that of their non-disabled peers.[7]

But the story of the IDEA is not one of unceasing progress. Although the Act has helped to ensure equal educational opportunity for students with disabilities, some federal courts have diminished its protections.[8] The

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1. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1400).

2. *See* Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 426–29 (2012) (discussing the EAHCA's history).

3. *See* S. REP. NO. 104-275, at 7 (1996) (noting that before the EAHCA, approximately one million children were prevented from attending public school and four million did not receive "appropriate educational services"); *see also* 20 U.S.C. § 1400(c)(2) (stating that prior to the Act, "the educational needs of millions of children with disabilities were not being fully met").

4. 20 U.S.C. § 1400(d)(1)(A); *see also* Luna Perez v. Sturgis Pub. Schs., 598 U.S. 142, 144 (2023) (stating that the IDEA "seeks to ensure children with disabilities receive a free and appropriate public education").

5. This Article shall refer to "children with disabilities and their parents" as "children" unless otherwise stated.

6. *See generally* 20 U.S.C. § 1400 *et seq*.; 20 U.S.C. § 1415(i)(2)(C)(iii) (providing that the court "shall grant such relief as [it] determines is appropriate"); 34 C.F.R. § 300.516(c)(3) (2023).

7. *See generally* H.R. Con. Res. 329, 111th Cong. (2010) (detailing the IDEA's successes).

8. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 303 (2006) (holding that prevailing parents cannot recover expert fees as part of costs under the IDEA's fee-shifting provision); Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 61–62 (2005) (holding that

evolution of courts' application of the "Snapshot Rule"[9] in special education matters nationally offers a prime example of judicial subversion of the IDEA. The rule originated in the First Circuit as a guiding principle that reviewing courts should not judge the appropriateness of a child's special education program exclusively in hindsight, or automatically deem post-hoc evidence—i.e., evidence not available to a school district at the time it acted, failed to act, or made the decision at issue—dispositive of the issue in dispute.[10] Over time, however, it has transformed into a mandate that, in some circuits, bars courts' hindsight review and consideration of post-hoc evidence entirely.[11]

The Third Circuit's July 2022 divided (2-1), "precedential"[12] decision in *J.M. v. Summit City Board of Education*, represents the most recent instance of a U.S. Circuit Court of Appeals stripping fundamental special education rights from the very persons Congress intended to protect.[13] The majority held that, under the Snapshot Rule, courts may, and perhaps even must, summarily exclude post-hoc evidence from consideration in special education disputes concerning the location, identification, and evaluation of students with disabilities, known as "child find," and special education eligibility determinations.[14] In so holding, the Third Circuit adopted a narrow and restrictive interpretation of the Snapshot Rule from the Fifth and Ninth Circuits that belies the rule as it originated in the First Circuit[15] and deprives children of essential IDEA safeguards, such as the rights to present evidence,

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the burden of proof is on the party seeking relief in IDEA matters, but reserving judgment where state law allocates the burden to school districts); Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121, 125 (Joshua M. Dunn & Martin R. West eds., 2009) (opining that the *Arlington* and *Schaffer* decisions "are part of a 'pro-school' trend"); Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 295 (2013) (noting, with limited exceptions, "what has been largely a constricting trend in interpretation of the IDEA").

9. The Snapshot Rule employs a "photographic metaphor" to depict limitations on courts' consideration of evidence in IDEA disputes. *See* Perry A. Zirkel, *The "Snapshot" Standard Under the IDEA*, 269 EDUC. L. REP. 449, 450 (2011).

10. *See* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991–93 (1st Cir. 1990).

11. *See* discussion *infra* Sections II.C–D.

12. Quote marks are used around the term "precedential" because the majority decision conflicts with longstanding Third Circuit precedent. *See* discussion *infra* Section II.D. Where an intra-circuit conflict between panel holdings exists, the earlier precedential decision is controlling. 3d Cir. I.O.P. 9.1 (2018).

13. *See* J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 144–45 (3d Cir. 2022) (restricting courts' consideration of post-hoc evidence in child find and eligibility matters).

14. *See id.* at 144–45.

15. *See id.*; *see also* discussion *infra* Section II.D.

including "additional evidence"; to have a full and fair hearing; and to obtain a complete remedy where a school district has violated the Act.[16] Consequently, the right of countless children to file a complaint alleging a child find or eligibility breach under the IDEA is rendered meaningless.[17] Further, the decision creates a "loophole" through which school districts may escape liability, for without post-hoc evidence, parents seldom can prove that a child find or eligibility violation occurred and, thus, cannot obtain a remedy for district wrongdoing.[18] Immunizing school districts from liability incentivizes them to behave badly, including wrongfully denying special education evaluations, performing inadequate evaluations, and erroneously finding children ineligible for special education and related services, "leav[ing] children with disabilities in a vulnerable position and jeopardiz[ing] their educational progress."[19]

This Article posits that courts' exclusion of post-hoc evidence from consideration under the Snapshot Rule in child find and eligibility matters violates the IDEA, procedural due process, and fundamental fairness principles.[20] It proposes, instead, that governing constitutional and statutory principles require courts to consider post-hoc evidence broadly in IDEA child find and eligibility matters, with safeguards to ensure that school districts' decisions are not judged inappropriately in hindsight.

The article starts with a brief overview of the IDEA in Part I, focusing in particular on the child find and eligibility steps of the special education process and related procedural protections for children. Part II explores the origin, evolution, and disparate interpretations and applications of the

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16. *See* 20 U.S.C. § 1415(f), (g), (i)(2); *see also* G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015) (concluding that when a school district fails to meet its IDEA responsibilities and parents have acted timely and appropriately, the "child is entitled to be made whole with nothing less than a 'complete' remedy").

17. *See* 20 U.S.C. § 1415(b)(6)(A).

18. *See J.M.*, 39 F.4th at 148 (Greenaway, J., dissenting) ("I fear that we may have created a loophole that undermines the IDEA's purpose and insulates school districts from liability under the IDEA."). As Counsel for *Amici Curiae* in *J.M.*, the Author set out in detail the position largely adopted by Judge Greenaway in his dissent.

19. *See id.* at 151 (Greenaway, J., dissenting).

20. Most, if not all, of the arguments made in this Article apply equally to courts' exclusion of post-hoc evidence in the IEP context and justify broad consideration of post-hoc evidence in IEP matters. However, IEP disputes present some unique additional issues, e.g., IEP implementation in addition to IEP development, not addressed herein that warrant further discussion. For a discussion of post-hoc evidence in the IEP context, see Dennis Fan, *No Idea What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503 (2014); Perry A. Zirkel, *The "Snapshot" Standard Under the IDEA: An Update*, 358 WEST'S EDUC. L. REP. 767 (2018).

Snapshot Rule in IDEA matters nationally as well as the Third Circuit. Part III examines how precluding courts' consideration of post-hoc evidence in child find and eligibility matters contravenes the IDEA's language, intent, and purpose, Supreme Court precedent interpreting the IDEA broadly to safeguard the rights of children, and principles of procedural due process and fundamental fairness, while creating a loophole through which school districts may escape liability. Additionally, Part III highlights the disproportionate harm to children with limited financial means resulting from the blanket exclusion of such evidence. Part IV reviews the Third Circuit's application of the Snapshot Rule to the child find and eligibility contexts in its July 2022 decision in *J.M.*, and uses the decision as a vehicle to illustrate the harms caused by the exclusion of post-hoc evidence in this context and the unjust outcomes to which such bans lead. The article concludes in Part V with a proposal for courts' adoption of an alternate standard that allows for broad consideration of post-hoc evidence in child find and eligibility matters, subject to restrictions set forth in the evidentiary rules of court, provided courts do not *automatically* deem such evidence dispositive or decide these matters *exclusively* in hindsight. Until courts adopt the recommended standard, an amendment to the Act and/or federal special education regulations defining the terms "evidence" and "additional evidence" to include post-hoc evidence will produce needed clarity and uniformity on the issue. The proposal aligns with the IDEA's intent and purpose and precedential case law interpreting the same; ensures children receive the due process rights, protections, and remedies to which they are entitled under federal law; and safeguards principles of fundamental fairness. Adoption of the proposed standard nationally will enable the Third, Fifth, and Ninth Circuits to remedy, and the remaining U.S. Circuit Courts of Appeals ("Circuits") to prevent, a significant problem of their own making.

I. OVERVIEW OF THE IDEA'S CHILD FIND AND ELIGIBILITY PROCESSES AND RELATED PROCEDURAL SAFEGUARDS

Prior to 1975, school districts routinely denied children with disabilities access to an adequate education.[21] Two landmark federal cases challenging the denial of access to education for children with disabilities,[22] and their

21. *See* S. REP. NO. 104-275, at 7 (1996); *see also* 20 U.S.C. § 1400(c)(2).

22. *See generally* Pennsylvania Ass'n for Retarded Child. v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971).

unwarranted exclusion from school without due process,[23] transformed the educational landscape and led to Congress' passage of the 1975 Education for All Handicapped Children Act,[24] now known as the Individuals with Disabilities Education Improvement Act or "IDEA." Enacted under the Spending Clause, the IDEA provides federal funding to states in exchange for their commitment to provide children with disabilities with a free, public education system that complies with the Act's mandates.[25] Presently, every state accepts federal monies to operate a special education program.[26]

The Act requires that all eligible children with disabilities between the ages of three and twenty-one have available to them a FAPE that "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[27] It defines "child with a disability" as a child:

> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.[28]

A FAPE includes special education, defined as specially designed instruction and related services individually tailored to meet the child's unique needs, and "related services," which are supportive services "required to assist a child . . . to benefit from" that instruction.[29] For every eligible child with a disability, states, through their local school districts, must develop, implement, and review annually a written plan known as the individualized

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23. *See generally* Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

24. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1400). Congress, in the 1990 IDEA reauthorization, shifted focus from providing access to appropriate special education and related services to improving the quality of special education and outcomes for children. *See* U.S. COMM'N ON CIV. RTS., MAKING A GOOD IDEA BETTER: THE REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2002), https://www.usccr.gov/files/pubs/idea/paper.htm#:~:text=The%201997%20amendments%20placed%20emphasis,into%20regular%20schools%20and%20classrooms [https://perma.cc/GX2N-4MJK].

25. *See* 20 U.S.C. § 1411.

26. *See* U.S. Dep't of Educ., *IDEA by State*, INDIVIDUALS WITH DISABILITIES EDUC. ACT (May 24, 2022), https://sites.ed.gov/idea/states/ [https://perma.cc/3SLT-8V3R].

27. 20 U.S.C. §§ 1400(d)(1)(A), 1411(b)(i); *see also* Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982) (defining "appropriate" education as "sufficient to confer some educational benefit upon the handicapped child").

28. 20 U.S.C. § 1401(3)(A).

29. 20 U.S.C. § 1401(9), (26), (29).

education program ("IEP"),[30] which serves as the "roadmap" for the child's education.[31] The IEP must include a description of the child's present levels of performance, a statement of the child's educational needs (including academic as well as social, emotional, behavioral, health, and daily living needs that affect the child's ability to learn), the programs and services to be provided, and a statement of measurable goals (and, in some states, objectives) individually tailored for the child to meet those needs, among other elements.[32] Districts must deliver children's special education programming in the least restrictive environment, i.e., educate students with their non-disabled peers, "[t]o the maximum extent appropriate."[33]

The IDEA requires states to have policies and procedures to assure that they meet their affirmative obligation to provide access to special education programs and services to all eligible children, and that the rights of children are protected.[34] Pertinent to this article are the policies, procedures, and rights that relate to the first two steps in the special education process—child find and eligibility.

A. Child Find

The child find process comprises three separate affirmative duties that the Act places upon states: to identify, locate, and evaluate "[a]ll children with disabilities residing in the State . . . who are in need of special education and related services."[35] "All children with disabilities" includes those who are homeless, wards of the state, attending private school, highly mobile, and, importantly, children who are suspected of having a disability even if they are advancing from grade to grade.[36] States meet their child find identification responsibility by implementing a comprehensive public awareness campaign that aims to *identify* children with disabilities who need special education and

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30. 20 U.S.C. §§ 1401(14), 1414(d). A school district cannot implement a child's initial IEP without informed parental consent. *See* 20 U.S.C. § 1414(a)(1)(D).

31. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) (identifying the IEP as the "*modus operandi*" of the Act).

32. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 399.39 (2019) (defining "special education" as "meet[ing] the unique needs of a child with a disability[,]" which sometimes includes development of physical and motor fitness, development of awareness of the child's living environment, and preparation for a career); *see also* U.S. DEP'T OF EDUC., SUPPORTING CHILD AND STUDENT SOCIAL, EMOTIONAL, BEHAVIORAL, AND MENTAL HEALTH NEEDS 17 (2021).

33. 20 U.S.C. § 1412(a)(5).

34. 20 U.S.C. § 1400(d)(1)(A)–(B); *see also* 20 U.S.C. § 1415.

35. 20 U.S.C. § 1412(a)(3)(A).

36. *Id.*; 34 C.F.R. § 300.111(a), (c) (2023).

related services and to determine which of these children are already receiving these services.[37] Next, states must *locate* children who are or may be eligible but are not receiving special education programming and services.[38] Finally, states must refer children who have been located to their local school districts to *evaluate* them for special education eligibility.[39]

States must have in place processes for referring students with disabilities for an evaluation and for performing special education evaluations that accord with procedures and timelines set forth in the Act.[40] Although parents can, and frequently do, refer children for an evaluation, the affirmative duty to ensure that children with disabilities are referred ultimately lies with the state.[41] Following referral and a school district determination that a child requires an evaluation, the district has sixty days from the date of informed, parental consent to evaluate the student, with limited exceptions.[42]

The IDEA and corresponding federal regulations subject evaluations to numerous requirements.[43] For example, the evaluation must be multi-disciplinary, i.e., "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" to determine if the child has a disability and the child's educational needs, which form the basis of the IEP.[44] No individual measure or assessment can serve as the sole criterion for deciding if a child is eligible or for developing the IEP.[45] Evaluation materials must be in the child's native language or primary mode of communication, and cannot be racially or culturally discriminatory.[46] Importantly, the child must be assessed in *all* areas of suspected disability, "including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]"[47] A disability is "suspected" when a school district is on

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37. 20 U.S.C. § 1412(a)(3)(A).
38. *Id.*
39. *See id.*; *see also* 20 U.S.C. § 1414(a)(1)(B).
40. *See* 20 U.S.C. § 1412(a)(3)(A); *see also, e.g.*, N.J. ADMIN. CODE § 6A:14-3.3(a) (2023) (providing that "[e]ach district board of education shall develop written procedures for students age three through 21 . . . who reside within the local school district with respect to the location, and referral of students who may have a disability").
41. *See* 20 U.S.C. § 1412(a) (mandating states implement child find in exchange for federal financial assistance).
42. 34 C.F.R. § 300.301(c)(1) (2023).
43. *See generally* 20 U.S.C. § 1414(a)–(c); *see also* 34 C.F.R. § 300.301–.305 (2023).
44. 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1) (2023).
45. 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2) (2023).
46. 20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1) (2023).
47. 34 C.F.R. § 300.304(c)(4) (2023); *see also* 20 U.S.C. § 1414(b)(3)(B).

notice the child has demonstrated symptoms of the disability.[48] In addition, the evaluation comprises a review of information provided by the child's teacher(s); classroom, district, and statewide assessments; classroom observations; and other information and data as necessary and appropriate.[49] The evaluation also must include input from parents, including assessments and recommendations from service providers and evaluators secured privately or via the independent evaluation process,[50] discussed in Section I.C.

States' proper implementation of their affirmative child find duties is essential to ensuring that children with disabilities receive the FAPE to which they are entitled and which they require to make adequate educational progress.[51] Only a thorough child study team evaluation will provide the information regarding a child's abilities, performance, and needs that a district requires to make appropriate eligibility, IEP, and educational placement decisions.[52] Federal regulations require the evaluation to be "sufficiently comprehensive to identify *all* of the child's special education and related services needs, whether or not commonly linked to the disability category."[53] Courts have emphasized the significance of an appropriate

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48. *See, e.g.*, D.K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2012) (concluding a district's failure to identify student within a reasonable time after being put on notice of "behavior that is likely to indicate a disability" can constitute a child find violation); Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917, 926 (11th Cir. 2015) (finding a district's knowledge that a student was seeking treatment for hearing loss constituted notice of a suspected hearing impairment); N.B. v. Hellgate Elementary Sch. Dist. *ex rel.* Bd. of Dirs., 541 F.3d 1202, 1209 (9th Cir. 2008) (concluding a district's knowledge of a doctor's suspected diagnosis of autism put it on notice the child had a suspected disability requiring an evaluation).

49. 20 U.S.C. § 1414(c)(1)–(2); *see also* 34 C.F.R. § 300.305(a)(1)–(2) (2023). Existing evaluation data is used to decide what additional information and data is necessary to determine a child's needs and IDEA eligibility. *See id.*

50. 20 U.S.C. § 1414(c)(1)(A)(i); 34 C.F.R. § 300.305(a)(1)(i) (2023).

51. *See D.K.*, 696 F.3d at 250 (noting that "a poorly designed and ineffective round of testing does not satisfy a school's Child Find obligations"); *see also Phyllene W.*, 630 Fed. App'x at 926–28 (finding a district has an independent responsibility to evaluate a student when on notice of a suspected disability and insufficient information about the student's needs made "accomplishment of the IDEA's goals impossible"); Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1119 (9th Cir. 2016) (holding a district's failure to test a student in all areas of suspected disability deprived the IEP team of critical evaluative information, making it impossible to develop appropriate IEP and denying a FAPE).

52. *See Timothy O.*, 822 F.3d at 1119; *see also* Z.B. v. District of Columbia, 888 F.3d 515, 522–24 (D.C. Cir. 2018) (noting that "[u]nderstanding the particulars of a child's current skills and needs is critical to developing an 'individualized' educational plan" and failure to perform needed assessments may prevent the IEP team from obtaining necessary information about the student, leading to a FAPE deprivation).

53. 34 C.F.R. § 300.304(c)(6) (2023) (emphasis added).

evaluation, holding that a "poorly designed and ineffective round of testing does not satisfy a school's Child Find obligations."[54]

Child find also must occur in a timely manner.[55] The Third Circuit has described a school district's "duty to identify [a child's] needs within a reasonable time period and to work with the parents and the IEP team to expeditiously design and implement an appropriate program of remedial support" as a "*profound responsibility, with the power to change the trajectory of a child's life*."[56] Likewise, the sooner the cooperative process between parents and schools to address a child's special education needs starts, "the better for the well-being of the child, the goals of the school district, and the relationship between the family and school administrators."[57] States' timely and appropriate implementation of child find is, therefore, critical to the developmental and educational success of children with disabilities.

B. Eligibility

As stated above, school districts rely upon child find evaluation information and data to determine both the educational needs of a child and the child's IDEA eligibility.[58] The Act and corresponding federal regulations provide a two-part test for special education eligibility: First, the student must have one of the impairments set forth in the Act, and second, the student must need special education and related services because of the impairment.[59]

Particularly relevant to this article are state special education regulatory requirements that districts perform specific assessments for certain eligibility categories and that certain assessments be performed by professionals

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54. *See, e.g.*, *D.K.*, 696 F.3d at 250; *see also* sources cited *supra* notes 51–52.

55. *See, e.g.*, Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 253 (3d Cir. 1999) (finding a district's failure to timely evaluate a student may constitute a FAPE deprivation requiring a remedy); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 271 (3d Cir. 2012) (noting child find must be "done within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability" (quoting W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995))); Kraweitz *ex rel.* Parker v. Galveston Indep. Sch. Dist., 900 F.3d 673, 677 (5th Cir. 2018) (concluding a district's four-month delay in complying with child find was unreasonable and denied a FAPE).

56. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015) (emphasis added) (holding that if a parent files a complaint within two years of the "knew or should have known" date and demonstrates liability, the child is entitled to a remedy for the entire duration of the FAPE deprivation).

57. *Id.*

58. 20 U.S.C. § 1414(a)(1)(C).

59. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1) (2023).

holding particular qualifications.[60] For example, to be classified under the "autism" category in New Jersey, a student must be assessed by both "a certified speech-language specialist" and a "physician trained in neurodevelopmental assessment."[61] Similarly, classification under the "Other health impairment" category (e.g., epilepsy, Attention Deficit Hyperactivity Disorder ("ADHD")) requires a "medical assessment documenting the disabling health problem."[62] Thus, if a student is suspected of having one of these disabilities, the district must perform the additional testing denoted in state regulations.

When performed properly, an evaluation should provide "a complete picture of the child's functional, developmental, and academic needs," all of which are essential to determining eligibility and "fundamental to creating an appropriate educational program."[63] Conversely, failure to assess a child appropriately deprives the district of the information needed to ascertain eligibility and deliver a FAPE.[64] To borrow an analogy from criminal law: A defective, i.e., inappropriate, special education evaluation is like a "poisonous tree" from which any and all "fruits" that grow—here, all subsequent decisions that are made regarding a student's educational needs, special education eligibility, the development of an IEP, and the provision of a FAPE—are tainted.[65] An evaluation that appropriately assesses a student in all areas of suspected disability is essential to prevent the student from remaining "undiagnosed, untreated, and unable to reach their full educational potential."[66]

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60. *See, e.g.*, N.J. ADMIN. CODE § 6A:14-3.5(c)(1) (requiring audiological and speech and language evaluations be performed by appropriately qualified and certified specialists for classification as auditorily impaired); *Id.* § 6A:14-3.5(c)(4) (requiring assessment by a certified speech-language specialist where a communication impairment is suspected).

61. *Id.* § 6A:14-3.5(c)(2).

62. *Id.* § 6A:14-3.5(c)(9).

63. Z.B. v. D.C., 888 F.3d 515, 523 (D.C. Cir. 2018) (citation omitted).

64. *See* Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1119 (9th Cir. 2016); *see also* sources cited *supra* notes 51–52; N.B. v. Hellgate Elementary Sch. Dist. *ex rel.* Bd. of Dirs., 541 F.3d 1202, 1210 (9th Cir. 2008) (holding a district's failure to obtain evaluative information regarding a student's autism made it impossible for the IEP team to develop an appropriate IEP).

65. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

66. *Timothy O.*, 822 F.3d at 1122.

C. IDEA Procedural Safeguards Relevant to the Child Find and Eligibility Contexts

The U.S. Supreme Court has identified "the cooperative process that [the IDEA] establishes between parents and schools" as the "core of the statute."[67] However, "recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage," Congress developed an "elaborate set" of procedural safeguards to protect the rights of children.[68] Accordingly, the IDEA "imposes significant requirements [upon states] to be followed in the discharge of [their] responsibility" to provide children with disabilities a FAPE.[69] In enacting the procedural safeguards, Congress aimed to protect children from unilateral decision-making by school districts and to ensure full parental participation and involvement in the special education process.[70]

Where a substantive dispute arises between a parent and district concerning the identification, evaluation, educational placement, and provision of a FAPE to a child with a disability, the parent has the right to present a complaint and to have an impartial due process hearing conducted in accordance with the IDEA, state law, and regulations.[71] At the hearing, the parent has many rights, including, "to be accompanied and advised by counsel" and by those with specialized knowledge or expertise; "to present evidence"; and to "confront, cross-examine and compel the attendance of witnesses."[72] Special education due process hearings are "deliberately informal and intended to give [administrative law judges] the flexibility that they need to ensure each side can fairly present its evidence."[73] Upon exhaustion of administrative remedies, a parent has the right to bring a civil action at which the court, "shall hear additional evidence at the request of a party," and "shall grant such relief as [it] determines is appropriate."[74]

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67. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 53 (2005).

68. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985).

69. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 182–83 (1982).

70. *See Sch. Comm. of Burlington*, 471 U.S. at 368 ("In several places, the Act emphasizes the participation of parents in developing the child's educational program and assessing its effectiveness.").

71. 20 U.S.C. § 1415(b)(6), (f)(1).

72. 20 U.S.C. § 1415(h).

73. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 61 (2005).

74. 20 U.S.C. § 1415(i)(2).

In addition to the above safeguards, and relevant to this Article, parents have the "opportunity . . . to obtain an independent educational evaluation of the child."[75] The IDEA and corresponding federal and state regulations set forth the right of parents to obtain independent evaluation(s) ("IEE(s)") and the procedural requirements triggered when a district receives an IEE request.[76] The federal regulations provide:

> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency . . .
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing . . . that the evaluation obtained by the parent did not meet agency criteria . . . .[77]

The regulations further state that an IEE obtained at public or private expense "may be presented . . . as evidence at a hearing on a due process complaint."[78]

In sum, a student's receipt of appropriate special education and related services depends upon: 1) The state meeting its affirmative child find and eligibility (as well as FAPE) responsibilities in accordance with the IDEA; and 2) the state's implementation of procedural safeguards to ensure parental participation in the special education process and that the rights of children are protected where a school district acts wrongfully, regardless of intention, or fails to act at all. Courts have acknowledged the detrimental effects of an inadequate education, finding, "even a 'few months' in an unsound program can make a '*world of difference in harm*' to a child's educational development."[79] Thus, one cannot understate the importance of states' timely

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75. 20 U.S.C. § 1415(b)(1); *see also Sch. Comm. of Burlington*, 471 U.S. at 368.

76. *See* 20 U.S.C. § 1415(b)(1); *see also* 34 C.F.R. § 300.502 (2023); N.J. ADMIN. CODE § 6A:14-2.5(c).

77. 34 C.F.R. § 300.502(b) (2023).

78. 34 C.F.R. § 300.502(c)(2) (2023).

79. Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 142 (3d Cir. 2017) (emphasis added) (quoting Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 121–22 (1st Cir. 2003)); *see also* Plyler

and comprehensive identification, location, and evaluation of students with disabilities, proper determination of eligibility, and implementation of procedural protections in accordance with the IDEA's letter and spirit.

II. ORIGIN AND EVOLUTION OF THE SNAPSHOT RULE

Post-hoc evidence[80] often is essential for parents of children with disabilities to prove a school district violated the IDEA and deprived their child of a FAPE.[81] Nothing in the text of the Act, its implementing regulations, or related legislative and regulatory histories, restricts the evidence presented in a due process hearing or trial, or courts' consideration of such evidence.[82] The origin and evolution of the judicially-created Snapshot Rule demonstrate how the original guiding principle against deciding IDEA matters *exclusively* in hindsight morphed, in some Circuits, into a ban on courts' consideration of evidence that accrues *after the time* of the school district's decision, action, or inaction in dispute, i.e., the snapshot.[83]

The Circuits are split as to whether post-hoc evidence may be considered in special education matters and in what context.[84] They also are divided regarding the purpose(s) for which such evidence, if admitted, may be used, and how much weight to accord it.[85] In the more than thirty years since the Snapshot Rule originated, most Circuits have limited the rule's application to disputes concerning the appropriateness of a child's IEP; to date, only the Fifth, Ninth, and Third Circuits have extended the Snapshot Rule to the child

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v. Doe, 457 U.S. 202, 221 (1982) (noting the "lasting impact of [education's] deprivation on the life of [a] child").

80. Post-hoc evidence also may be referred to as "later-occurring," "retrospective," and "hindsight" evidence. *See* Zirkel, *supra* note 9, at 450; J.M. v. Summit City Bd. Of Educ., 39 F.4th 126, 144–45 (3d Cir. 2022).

81. *See* discussion *infra* Sections III.A, III.E.

82. *See generally* 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.* (2023). This statement is based upon the Author's review of evidence-related provisions in the IDEA, federal special education regulations, and their respective legislative and regulatory histories.

83. *See, e.g.*, M.B ex rel. Berns v. Hamilton Southeastern Sch., 668 F. 3d 851, 862–63 (7th Cir. 2011) (adopting a strict interpretation of the Snapshot Rule by disallowing consideration of any evidence following the IEP meeting in dispute); R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187 (2d Cir. 2012) (applying a temporal bar to restrict post-hoc evidence consideration in an IEP matter).

84. *See* discussion *infra* Sections II.B–D.

85. *See id.*

find and eligibility contexts.[86] A brief review of the FAPE definition and the role of courts in reviewing IDEA decisions, followed by an examination of the Snapshot Rule's origin and history, shed light on the rule's rationale and the way in which several Circuits, including the Third, have misconstrued and misapplied it, causing harm to children.

A. Definition of a FAPE and the Role of Courts Reviewing IDEA Matters

The Supreme Court first addressed the FAPE definition and courts' reviewing role under the IDEA in 1982, in *Board of Education of Hendrick Hudson Central School District v. Rowley*.[87] At issue was whether Amy, a young student who was deaf but an excellent lip reader, required sign language instruction in general education academic classes to receive a FAPE.[88] The Supreme Court defined a FAPE as providing "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[89] In deciding the matter, the Court refused to create a single test for "determining the adequacy of educational benefits" for children under the Act, and confined its analysis to children who, like Amy, were performing average in "regular" education classrooms with their non-disabled peers.[90] For these children, the Court found "[t]he grading and advancement system . . . constitutes an important factor in determining educational benefit," and concluded, "the IEP should

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86. *See* Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 214 (5th Cir. 2019) (barring courts' consideration of post-hoc evidence in the eligibility context); L.J. v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017) (holding the appropriateness of student's eligibility determination is to be assessed at the time of the evaluation); Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 760, 762 (3d Cir. 1995) (determining that "a court must . . . consider evidence relevant, non-cumulative and useful in determining whether Congress' goal has been reached for the child involved" and post-hoc evidence "may be considered only with respect to the *reasonableness* of the district's decision at the time it was made"). *But see* J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 144–45 (3d Cir. 2022) (concluding courts may (or must) summarily exclude post-hoc evidence offered to prove a child find breach).

87. *See* Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 188–89, 206 (1982) (defining FAPE as "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction" and requiring that reviewing courts base their decisions on the preponderance of the evidence while cautioning them from substituting their own judgement for that of the school authorities they review).

88. *Id.* at 184–85.

89. *Id.* at 189.

90. *Id.* at 202.

be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[91] Despite holding the Act does not guarantee any particular outcome for a student, the Court considered and relied upon the district court's assessment of Amy's progress in determining she received a FAPE,[92] finding the "evidence firmly establishes that Amy . . . performs better than the average child in her [regular public school] class and is advancing easily from grade to grade."[93]

Thirty-five years later, the Court revisited the FAPE definition in *Endrew F. v. Douglas County School District*, which concerned Endrew, a fifth grade student with autism, who, unlike Amy, could not be educated in general education classes with non-disabled peers.[94] The Court found that *Rowley* set forth a "general approach" for meeting the substantive FAPE obligation, namely that "a school must offer an IEP reasonably calculated to enable a child *to make progress appropriate in light of the child's circumstances*."[95] It acknowledged that the educational benefit measures used for Amy, specifically grade-level advancement and progress in the general education curriculum, are not reasonable for all children, including Endrew.[96] "It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot."[97] The Court emphasized that the "reasonably calculated" criterion for IEPs "reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials."[98] However, as with *Rowley*, the Court referenced Endrew's *actual* progress, noting that within months of his unilateral placement by his parents at a private school, "Endrew's behavior improved significantly, permitting him to make a degree

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91. *Id.* at 203–04 (noting school districts monitor the progress of children educated in "regular classrooms of public schools" through exams, grading, and annual advancement to higher grade levels).

92. *See id*. at 209–10.

93. *Id.*; *see also* Fan, *supra* note 20, at 1520 (stating evidence of Amy's success in school was "at least a factor in Justice Rehnquist's opinion").

94. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 395, 399, 402–03 (2017) (clarifying a FAPE is tailored to the child's unique needs and the IEP must be reasonably calculated for the child to make educational progress that is "appropriate in light of the child's circumstances").

95. *Id.* at 404 (emphasis added).

96. *See id.* at 402 (explaining the Court had no need in *Rowley* to address the concerns of children being educated outside general education classrooms and incapable of achieving on grade level).

97. *Id.*

98. *Id.* at 399.

of academic progress that had eluded him in public school."[99] Significantly, at no time in either *Rowley* or *Endrew F*. did the Court exclude consideration of the student's educational progress, i.e., post-hoc evidence, in determining the receipt of a FAPE, despite that such evidence post-dated the creation of the IEPs in question, i.e., the snapshot in time when the disputed issues first arose.[100]

In addition to providing a FAPE definition and window into courts' consideration of progress in determining the provision of a FAPE, the Supreme Court in *Rowley* addressed the role of courts in reviewing special education matters.[101] According to the Act, reviewing courts "shall receive the records of administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."[102] Under the preponderance of the evidence standard, "[l]ess deference is given to the administrative decisions" as compared to most other federal agency matters where courts apply the "highly deferential 'substantial evidence'" test.[103] However, the Court determined that the preponderance standard does not invite de novo review because Congress left to state and local educational agencies "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs" *provided that* state and local educational agencies comply with the Act's procedural safeguards.[104] Significantly, the Court found that this responsibility must be fulfilled "*in cooperation with the parents or guardian of the child*."[105] Due to courts' insufficient "specialized knowledge and experience" regarding "difficult questions of educational policy," and recognition that certain special education procedures "would be frustrated if a court were permitted simply to set state decisions at nought," the Court cautioned reviewing courts to "be careful to avoid imposing their view of preferable educational methods upon the States" and to refrain from "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."[106]

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99. *Id.* at 396.

100. *See generally Rowley*, 458 U.S. 176; *Endrew F.*, 580 U.S. 386.

101. *See Rowley*, 458 U.S. at 206.

102. 20 U.S.C. § 1415(i)(2)(C).

103. Susan G. Clark, *Judicial Review and the Admission of "Additional Evidence" Under the IDEIA: An Unusual Mixture of Discretion and Deference*, 201 EDUC. L. REP. 823, 827 (2005).

104. *Rowley*, 458 U.S. at 206–07.

105. *Id.* (emphasis added).

106. *Id.* at 206–08.

Following *Rowley*, courts began implementing a review standard that falls somewhere between substantial deference and de novo review.[107] For example, the Third Circuit applies a "modified de novo review" standard, whereby the reviewing court must "make findings of fact based on a preponderance of the evidence contained in the *complete record*, while giving some deference to the fact findings of the administrative proceedings."[108] This standard aligns with both the Act's mandate that courts hear "additional evidence" at a party's request,[109] and the Supreme Court's holding that reviewing courts give prior administrative proceedings "due weight."[110] Importantly, "the standard of judicial review 'should never be mistaken for . . . evidentiary directives,' such as . . . the standard for admission of additional evidence."[111] Thus, "*Rowley*'s deference command limits district court factfinding only, not its application of relevant legal standards."[112]

As stated above, neither the IDEA nor its legislative or regulatory history imposes any limits on the Act's evidence provisions.[113] The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"; thus, the plain language of the statute, unless absurd, must be enforced "according to its terms."[114] Courts have interpreted the IDEA's "additional evidence" language as meaning supplemental, acknowledging the "source" of evidence on review "generally will be the administrative hearing record, with some supplementation at trial."[115] While courts have discretion to determine what additional evidence should be considered,[116] they must be "careful not to allow such [additional] evidence to change the character of the hearing from

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107. *See* Fan, *supra* note 20, at 1516.

108. *See* S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 269–70 (3d Cir. 2003) (adopting modified de novo review standard and holding reviewing courts must give "due weight" to the administrative decision, i.e., make findings of fact based on a preponderance of the evidence in the record, while giving some deference to administrative fact finding, but deferring to the ALJ's credibility determinations unless "countered by non-testimonial evidence on the record").

109. 20 U.S.C. § 1415(i)(2)(C)(ii).

110. *See Rowley*, 458 U.S. at 206.

111. Andriy Krahmal et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. J. ON C.L. & C.R. 201, 203 (2004).

112. *See* Fan, *supra* note 20, at 1517.

113. *See supra* note 82 and accompanying text.

114. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (citations omitted).

115. Town of Burlington v. Dep't. of Educ., 736 F.2d 773, 790 (1st Cir. 1984).

116. *See* Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 205 (1982) (citing the EAHCA at 20 U.S.C. § 1415(e)(2), now 20 U.S.C. § 1415(i)(2)(C)(ii)).

one of review to a trial *de novo*."[117] Thus, where a reviewing court hears additional evidence, it may accept or reject the findings of the Administrative Law Judge ("ALJ") "depending on whether those findings are supported by the new, expanded record and whether they are consistent with the requirements of the Act."[118] If the court makes a decision on the record without hearing additional evidence, it must provide evidentiary support for any conclusions of fact that conflict with the ALJ's findings and explain why it does not accept the findings.[119] The explanation is required to avoid the impression that the court is "substitut[ing] [its] own notions of sound educational policy for those of the educational agencies [it] reviews."[120] Importantly, the Supreme Court in *Rowley* never forbade courts from substituting judgment;[121] rather, courts simply must provide justification for any such substitution.[122]

Although the *Rowley* Court safeguarded school districts' right to make educational decisions for students with disabilities, it did not leave children unprotected.[123] The Court acknowledged the significance of the Act's procedural safeguards, declaring, "[T]he importance Congress attached to these [] safeguards cannot be gainsaid."[124] It concluded that Congress sought to maximize parents' active and meaningful participation in all aspects of the special education system and process "by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual education program."[125] According to the Court, Congress included IDEA provisions regarding parental participation and involvement to "protect individual children" and "assure that appropriate

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117. *Town of Burlington*, 736 F.2d at 790–91.

118. Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1220 (3d Cir. 1993).

119. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 758 (3d Cir. 1995).

120. *Id.* at 757.

121. *See generally Rowley*, 458 U.S. 176.

122. *See Town of Burlington*, 736 F.2d at 791–92.

123. *See Rowley*, 458 U.S. at 208 ("Entrusting a child's education to state and local agencies does not leave the child without protection.").

124. *Id.* at 205.

125. *Id.* at 208. "The requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort *to maximize parental involvement* in the education of each handicapped child." *Id.* at 182 n.6 (emphasis added); *see also* 20 U.S.C. § 1400(c)(5) ("[T]he education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.").

services are provided."[126] Over forty years of Supreme Court and circuit court precedent have stressed the importance of parent participation and involvement in the Act.[127]

By highlighting IDEA provisions concerning state responsibilities, guarantees for parental involvement, and requirements for cooperation between parents and school districts, the *Rowley* Court, essentially, created a framework for a "check and balance" system to ensure the provision of a FAPE to children with disabilities. Under this system, the Court's warning that reviewing courts not substitute their judgment of preferred methods or policy for those of the states and school authorities they review *is based upon and balanced by* two presumptions: First, that districts are fulfilling their duty to ensure the rights of students with disabilities and their parents are protected, including the right to a FAPE, the right to a full and fair hearing, and the right of parents to actively and meaningfully participate in the special education process; and second, that parents are, in fact, involved in the special education of their children and do "not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."[128] In reality, however, these presumptions often do not prove true, due to school district-created barriers (both intentional and unintentional) to implementation of the Act's safeguards and parental participation, as well as family life circumstances that inhibit parental involvement.[129] As explained below, courts' application of the Snapshot Rule to instances where one or both of these presumptions is not accurate removes the "checks" from the

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126. *Rowley*, 458 U.S. at 208, 209; *see also* 20 U.S.C. § 1400(d)(1)(B) (providing the purpose of the IDEA is to ensure the availability of a FAPE to eligible children with disabilities and "*to ensure that the rights of children with disabilities and parents of such children are protected*" (emphasis added)); 20 U.S.C. § 1412(a)(19) ("Prior to adoption of any policies and procedures needed to comply with this section . . . the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.").

127. *See, e.g.*, *Rowley*, 458 U.S. at 208 n.6; Beth V. v. Carroll, 87 F.3d 80, 82 (3d Cir. 1996) (stating that IDEA puts responsibility on the state to satisfy the Act's goals, including, "maximiz[ing] parental involvement in decisions affecting their children's education"); M.M. *ex rel.* C.M. v. Sch. Bd., 437 F.3d 1085, 1095–96 (11th Cir. 2006) (determining parental involvement is "critical" in the IEP process and "full parental involvement is the purpose of many of the IDEA's procedural requirements").

128. *Rowley*, 458 U.S. at 209.

129. This statement is based on the Author's experience representing parents of students with disabilities in special education matters, including in administrative hearings and federal court proceedings, for more than twenty years. *See* Jacqueline Hernandez et al., *Continuing Barriers in Special Education*, NAT'L ASS'N OF SOC. WORKERS CAL. NEWS (Aug. 1, 2019), https://naswcanews.org/continuing-barriers-in-special-education/ [https://perma.cc/6RYY-NELA].

check and balance system; consequently, courts limit and, at times, preclude parents from putting on an affirmative case by barring the consideration of later-acquired evidence, bending the scale overwhelmingly in favor of districts in special education disputes.

B. Origin of the Snapshot Rule

The Snapshot Rule developed in response to the question of whether courts should consider a student's progress (or lack thereof) when assessing the appropriateness of an IEP.[130] The rule originated in 1990, in *Roland M. v. Concord School Committee*, which concerned the adequacy of IEPs provided to a student with average intelligence, significant potential, and multiple disabilities.[131] The hearing officer found the IEPs appropriate,[132] and the district court affirmed, basing its decision exclusively on the administrative record.[133]

On appeal to the First Circuit, the parents argued that the lower court committed clear legal error because the child's significant academic progress at the private school, where he was unilaterally placed by his parents, demonstrated the inappropriateness of the child's IEPs.[134] The First Circuit acknowledged that academic potential and progress *are* factors to be considered in determining an IEP's adequacy, but these factors are "not the *only* indicia of educational benefit," and reliance upon academic progress alone to demonstrate the inadequacy of an IEP, as the parents proposed, would result in a "*per se* approach" that is "far too simplistic."[135] Citing *Rowley*, the Court concluded that, when deciding an IEP's appropriateness, a court must determine if the IEP was "reasonably calculated" to provide a FAPE at the time it was developed.[136]

In so concluding, the Court stressed the importance of two aspects of the "reasonable calculation" standard that ultimately gave birth to the Snapshot Rule: First, the Court noted that, "[i]n striving for 'appropriateness,' an IEP

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130. *See generally* Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990).

131. *See id.* at 988.

132. *See id.* at 988–89 (holding IEPs were appropriate because no nexus existed between the student's private school attendance and the progress he made while there).

133. *Id.* at 989, 996 (disallowing student's parents from calling additional witnesses because they deliberately withheld the testimony of these witnesses at the administrative hearing and thereby undermined the administrative process).

134. *See id.* at 991–92.

135. *Id.* (emphasis added).

136. *Id.* at 992 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).

must take into account what was, and was not, objectively reasonable *when the snapshot was taken*," i.e., when the IEP was created.[137] The Court described the IEP as "a snapshot, not a retrospective," and found that the "actions of school systems cannot . . . be judged *exclusively* in hindsight."[138] Significantly, by using the modifier "exclusively," the First Circuit did not hold that school district decisions, actions, or inaction cannot be judged retrospectively; it merely found that such a judgment cannot be made *solely or completely* in hindsight.[139]

Second, the Court found that the "reasonable calculation" standard requires choices to be made about educational policies and methodologies.[140] Harkening back to the Supreme Court's decision in *Rowley*, the First Circuit reiterated that reviewing courts must "give 'due weight' to the state agency's decision . . . to prevent judges from 'imposing their own preferable educational methods upon the States.'"[141] The First Circuit found that Congress undoubtedly wanted IDEA beneficiaries, i.e., children with disabilities, to have "effective results" and exhibit "demonstrable improvement," and concluded that "actual educational results *are relevant* to determining the efficacy of educators' policy choices."[142] In essence, a student's progress, or failure to make progress, matters. However, the Court cautioned against confusing "what is *relevant* with what is *dispositive*."[143] Thus, a student's progress or lack thereof, i.e., post-hoc evidence, under an IEP is relevant but "*not necessarily* a valid proxy for, or determinative of," an IEP's appropriateness or inadequacy.[144] Hence, the Snapshot Rule was born—not as a hard and fast rule, but rather as a general guiding principle for reviewing disputed IEP matters in which post-hoc evidence of a student's progress or lack thereof remained a factor for consideration.

The *Roland M.* opinion accords with the Supreme Court's decision in *Rowley* with respect to the FAPE definition, courts' consideration of progress

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137. *Roland M.*, 910 F.2d at 992 (emphasis added).

138. *Id.* (emphasis added).

139. *See id.*

140. *See id.* (noting that beyond a student's abilities and whether an IEP is appropriate, "courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs").

141. *Id.* at 989 (citing *Rowley*, 458 U.S. at 207).

142. *Id.* at 991 (emphasis added).

143. *Id.*

144. *Id.* at 993 (emphasis added) (concluding that "[c]omparative academic progress, in and of itself, is not necessarily a valid proxy for, or determinative of, the degree to which an IEP" was appropriate).

in reviewing FAPE decisions, and the role of reviewing courts.[145] The First Circuit found later-acquired evidence relevant and a "factor to be considered" by courts, but simultaneously acknowledged that it "is not the only indicia of educational benefit";[146] this position correlates with the *Rowley* Court's consideration of Amy's progress as "one important factor in determining educational benefit."[147] Further, according to *Roland M.*, courts still must heed the *Rowley* Court's caution that reviewing courts refrain from imposing their views upon the states by allocating due weight to administrative decisions.[148] In sum, the original Snapshot Rule recognized the value of post-hoc evidence and successfully balanced it against the desire not to overburden districts, *provided the districts acted in accordance with the Act*.

C. Application of the Snapshot Rule in IEP Disputes

To date, nearly every Circuit has addressed the Snapshot Rule's application in special education IEP disputes.[149] Problematically, however, some Circuits' adoption of the rule reveals how "innocuous language . . . evolved into a broad rule against retrospective evidence" due to misinterpretation and misapplication of the *Roland M.* and *Rowley* decisions.[150]

The Third Circuit, in *Fuhrmann ex rel. Fuhrmann v. East Hanover Board of Education*, was the first federal appellate court to consider the Snapshot Rule following *Roland M.*[151] The case involved the appropriateness of a child's IEPs and educational placement.[152] Due to concerns regarding the adequacy of the special education program offered, the parents unilaterally placed their child in a private school where, per the lower court, he made significant progress.[153] To accord with the *Rowley* "reasonably calculated" standard, the Third Circuit concluded that an IEP's "measure and

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145. *Compare Roland M.*, 910 F.2d 983, *with Rowley*, 458 U.S. 176, *and supra* Section I.A.

146. *See Roland M.*, 910 F.2d at 991–92.

147. *Rowley*, 458 U.S. at 207 n.28.

148. *See Roland M.*, 910 F.2d at 989–90.

149. *See generally* Zirkel, *supra* note 20 (summarizing Circuits' application of the Snapshot Rule); Fan, *supra* note 20 (discussing the Snapshot Rule's application to IEP disputes).

150. Fan, *supra* note 20, at 1539.

151. *See generally* Fuhrmann *ex rel.* Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993).

152. *See id.* at 1037–38.

153. *See id.* at 1034 (finding the student's progress was "considerably more dramatic" at the private school where he showed "significant gains in many areas of development" compared to his time at the public school).

adequacy . . . *can only be determined* as of the time it is offered to the student, and not at some later date."[154] The court opined that evidence of the child's "dramatic progress" at the private school, obtained after the IEP was developed but before the due process hearing and included in the administrative record, "although arguably relevant to the court's inquiry, cannot be substituted for *Rowley*'s threshold determination of a 'reasonable calculation' of educational benefit."[155] Citing to *Roland M.*, the court concluded that reviewing courts cannot engage in "'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement" and, thus, limited consideration of post-hoc evidence to *Rowley*'s threshold determination of "whether the original IEP was reasonably calculated to afford some educational benefit" at the time it was offered to the student.[156] In so doing, the Third Circuit transformed *Roland M.*'s broader holding that an IEP's appropriateness cannot be "judged *exclusively* in hindsight"[157] into a more restrictive "temporal evidentiary cutoff"[158] that left the door open for relevant post-hoc evidence to be considered but only in narrow and, arguably, ambiguous circumstances.[159] Notably, the *Fuhrmann* court's inflexible application of the Snapshot Rule to post-hoc evidence finds no support in the Act, its implementing regulations, legislative or regulatory histories, or Supreme Court precedent.

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154. *Id.* at 1040 (emphasis added).

155. *Id.* Importantly, neither party sought to introduce additional evidence in the civil action; at issue was the question of how much weight to accord evidence of progress or lack thereof where such evidence was gained after the school district's IEP decision(s) but before administrative review and was part of the administrative record. *See* Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 761–62 (3d Cir. 1995) (distinguishing the timing and availability of post-hoc evidence in *Fuhrmann* from *Susan N.*).

156. *Fuhrmann*, 993 F.2d at 1040.

157. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) (emphasis added).

158. Fan, *supra* note 20, at 1528.

159. *Id.* at 1534–35; *see also Susan N.*, 70 F.3d at 761–62 (explaining the *Fuhrmann* decision was "unusual" because panel members authored three separate opinions). In *Fuhrmann*, regarding the admissibility and weight of post-hoc evidence, Judges Garth, writing for the Court, and Mansmann, authoring a concurrence, agreed that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student." *Fuhrmann*, 993 F.2d at 1040. Yet they took different positions on post-hoc evidence. Judge Garth stated, "evidence of a student's later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit." *Id.* Judge Mansmann found, "evidence of what took place after the hearing officer rendered his decision . . . is not relevant" and therefore inadmissible. *Id.* at 1041 (Mansmann, J., concurring). In *Susan N.*, the court concluded, "Judge Garth's interpretation . . . should control the taking of evidence on judicial review that was not before the school district when it made its initial IDEA placement decisions." 70 F.3d at 762.

Two years later, the Third Circuit, in *Susan N. v. Wilson School District*, revisited the Snapshot Rule and provided some needed clarity and refinement on its application.[160] Although *Susan N.* concerned a dispute over the appropriateness of a child's special education evaluation (i.e., child find) and district's eligibility determination,[161] and not the adequacy of an IEP, the opinion greatly influenced other Circuits when applying the Snapshot Rule in IEP matters and, thus, warrants discussion here. The ALJ held in favor of the parents and found the student IDEA-eligible, but the appeals panel reversed.[162] The parents unilaterally placed their child in a private school and filed a civil action alleging violations of child find and eligibility and the denial of a FAPE.[163] The district court refused to consider the parents' additional evidence that, unlike in *Fuhrmann*, was not available until after the due process hearing, including testimony from the student's private school teachers and experts regarding her disability.[164] It interpreted *Rowley* to severely limit the IDEA's mandate that courts hear additional evidence at a party's request and, deciding in favor of the district, concluded the court had "discretion summarily to exclude altogether the consideration of additional evidence submitted by a party."[165]

The Third Circuit disagreed.[166] The court held that reviewing courts have discretion to determine what additional evidence to admit and what weight to accord it, but must evaluate proffered evidence before excluding it: "While a district court appropriately may exclude additional evidence, a court must exercise particularized discretion in its rulings so that it will consider evidence relevant, non-cumulative and useful in determining whether Congress' goal has been reached for the child involved."[167] With this holding, the *Susan N.* court clarified that no *rigid* temporal bar on post-hoc evidence exists, that courts may admit post-hoc evidence when it is helpful and

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160. *See Susan N.*, 70 F.3d at 762 (holding that "Judge Garth's interpretation of the statute should control" but adding that post-hoc evidence "should be used by courts only in assessing the reasonableness of the district's initial decisions regarding a particular IEP or the provision of special education services at all").

161. *See id.* at 753–55.

162. *Id.* at 754. The matter occurred in Pennsylvania, which has a two-tiered administrative system.

163. *Id.* at 754–55.

164. *Id.* at 755.

165. *Id.* at 758.

166. *Id.* at 759 ("[W]hile the purpose of the *Burlington* construction is to 'structurally assist [ ] in giving due weight to the administrative proceeding, as *Rowley* requires,' the court of appeals did not say that a district court arbitrarily or summarily could exclude additional evidence submitted by a party in pursuit of that deference." (citation omitted)).

167. *Id.* at 760.

relevant to the *Rowley* inquiry,[168] and that evidence of progress or lack thereof may be relevant but is not inherently or automatically dispositive.[169] The court's holding is rooted in deference to the *Rowley* warning that courts not substitute judgment regarding educational policy.[170] In addition, it is grounded in a desire to avoid "second guessing" a district's decisions "with information to which [the district] *could not possibly* have had access" when it made those decisions.[171]

In the two decades that followed, Circuits across the country adopted a wide spectrum of positions on courts' consideration of post-hoc evidence in special education matters, but predominantly limited their decisions to IEP disputes.[172] The decisions created what one scholar termed a "fann[ing] out" of Circuit positions as opposed to a clear split on the Snapshot Rule's application.[173]

For example, the Seventh Circuit adopted a hardline approach, implementing a stringent temporal bar that "disallow[s] all evidence following the IEP as a matter of practice, if not as a matter of law" when determining an IEP's appropriateness.[174] The court relies upon but misinterprets *Roland M.* as providing "substantive reasoning that supports wholesale exclusion of retrospective evidence."[175] Equally restrictive is the Second Circuit, which definitively states, albeit in dicta, that parents "cannot later use evidence that their child did not make progress under the IEP in

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168. *See id.* at 759–60 (citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 790 (1st Cir. 1984)) (finding "it would not be wise to devise a hard-and-fast rule" concerning courts' consideration of additional evidence).

169. *See id.* at 762 (citing Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995)) (finding that "a student's subsequent failure to make progress in school does not retrospectively render an IEP *per se* inappropriate"); *see also* Fan, *supra* note 20, at 1534.

170. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

171. *Susan N.*, 70 F.3d at 761–62 (emphasis added) (explaining that unlike in *Fuhrmann* where the post-hoc evidence was available at the due process hearing and in the administrative record, in *Susan N.*, the evidence was unavailable until the civil action).

172. *See generally* Zirkel, *supra* note 9; Fan, *supra* note 20; Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1384–90 (2016).

173. *See* Wittlin, *supra* note 172, at 1386.

174. *See* Fan, *supra* note 20, at 1529 (describing the Seventh and Ninth Circuits as having "adopted the *Fuhrmann* concurrence's strict temporal rule disallowing all evidence following the IEP"); *see also* M.B. *ex rel.* Berns v. Hamilton Se. Sch., 668 F.3d 851, 862–63 (7th Cir. 2011) (finding an IEP must be "evaluated prospectively and not in hindsight" and holding the lower court properly disregarded an expert's report issued two months after the IEP meeting at which the FAPE dispute arose).

175. *See* Fan, *supra* note 20, at 1529.

order to show it was deficient from the outset."[176] The Court erroneously overstates *Roland M.* as "disfavor[ing] retrospective evidence" to support its categorical time bar on post-hoc evidence,[177] despite that the First Circuit merely recommended a degree of caution in post-hoc evidence consideration.[178]

In contrast, the Fourth and Fifth Circuits have taken a more inclusive approach: Relying upon *Rowley*, the Fourth Circuit deems evidence of "progress, or the lack thereof," relevant and important but not dispositive.[179] The Fifth Circuit goes further to find that actual progress is a critical factor that courts must consider in deciding an IEP's appropriateness.[180] The Tenth Circuit implements the broadest approach of all the Circuits: Finding the IEP is "a program" that includes "both the written IEP document, and the subsequent implementation of that document," the Court concludes, "[w]hile we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such."[181] Thus, in the Tenth Circuit, a school district cannot "ignore the fact that an IEP is clearly failing," i.e., evidence of lack of progress.[182]

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176. R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 187 (2d Cir. 2012) (citations omitted) ("In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision."); *see also* Wittlin, *supra* note 172, at 1386 (describing the Second Circuit as being on the "most restrictive end" of the post-hoc evidence consideration spectrum).

177. *See R.E.*, 694 F.3d at 185–86.

178. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992–93 (1st Cir. 1990).

179. *See* M.S. *ex rel.* Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 327 (4th Cir. 2009) (finding, "in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit" but, relying upon *Rowley*, adding, "while important, [progress] is not dispositive").

180. *See, e.g.*, Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. *ex rel.* Barry F., 118 F.3d 245, 253 (5th Cir. 1997) (finding "objective indicia of educational benefit" are significant in determining an IEP's appropriateness); Hous. Indep. Sch. Dist. v. V.P. *ex rel.* Juan P., 582 F.3d 576, 588 (5th Cir. 2009) (identifying student benefit from the IEP as "one of the most critical factors" in determining the IEP's adequacy). The Eighth Circuit similarly identified academic progress as an "important factor" in determining the educational benefit of a student's IEP. *See* C.J.N. v. Minneapolis Pub. Schs., 323 F.3d 630, 638 (8th Cir. 2003) (citation omitted).

181. O'Toole *ex rel.* O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 701–02 (10th Cir. 1998) (differentiating between evaluating an IEP only, in which case the Court agrees with the Third Circuit's *Fuhrmann* holding, and evaluating an IEP and its implementation, in which case courts cannot exclude from consideration evidence the IEP is failing).

182. *Id.* at 702.

Finally, the First,[183] Ninth,[184] and Third (prior to the Court's 2022 decision in *J.M.*)[185] Circuits fall somewhere mid-spectrum concerning the application of the Snapshot Rule to the IEP context, with the Third Circuit's decision in *Susan N.*—that post-hoc evidence is neither *per se* excludable nor *automatically* dispositive if admitted, and the proper inquiry for admission is whether the report was relevant, non-cumulative, and otherwise admissible[186]—serving as a guidepost despite that the case concerned child find and eligibility and not IEP appropriateness. The First Circuit, where the Snapshot Rule originated, has since narrowed its view such that it more closely mirrors the in *Susan N.* approach.[187] Conversely, the Ninth Circuit, which originally adopted a restrictive post-hoc evidence approach in *Adams v. Oregon*,[188] appears to have softened its position in the last decade so that it, too, aligns with that of *Susan N.*[189]

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183. The First Circuit modified its application of the Snapshot Rule years after *Roland M.* such that actual progress may be used to show an IEP is appropriate but failure to progress does not necessarily mean the IEP is inappropriate. *See* Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008).

184. *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999, 1006 (9th Cir. 2011) ("[T]hat exclusive use of hindsight is forbidden does not preclude consideration of subsequent events. The clear implication of permitting some hindsight [evidence] is that additional data . . . may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." (citation omitted)).

185. Importantly, the Third Circuit's 2022 decision in *J.M.* has muddied the waters by creating an intra-Circuit conflict with *Susan N. See* discussion *infra* Part III.

186. *See* Susan N. *ex rel.* M.N. v. Wilson Sch. Dist., 70 F.3d 751, 760, 762 (3d Cir. 1995).

187. *Compare Lessard*, 518 F.3d at 29, *and* G.D. *ex rel.* Jeffrey D. v. Swampscott Pub. Schs., 27 F.4th 1, 13–14 (1st Cir. 2022) (declining to consider post-hoc evidence of student's progress at a private school because the progress post-dated the administrative hearing, and adding that "a comparison between the progress [made at the private school] with . . . progress at her local public school would not reveal that she had not received a FAPE"), *with* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990).

188. *See* Adams v. Oregon, 195 F.3d 1141, 1145, 1149 (9th Cir. 1999) (relying on *Rowley*'s caution that courts not second-guess decisions of school authorities they review to justify exclusion of post-hoc evidence, and holding courts do not judge Individualized Family Service Plans ("IFSPs") in hindsight and instead measure their adequacy at the time the plan was drafted); *see also* J.W. *ex rel.* J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 454 (9th Cir. 2010) (refusing to consider student's lack of progress with an IEP because courts "do[] not judge an IEP in hindsight" (citations omitted)).

189. *Compare Susan N.*, 70 F.3d at 762, *with E.M.*, 652 F.3d at 1006.

D. Application of the Snapshot Rule in Child Find and Eligibility Disputes

The prior cases concerned the Snapshot Rule's application in IEP matters, which present some unique post-hoc evidence issues that do not arise in disputes concerning child find and eligibility.[190] Unlike the "fan" of circuit court positions regarding the Snapshot Rule's application in IEP disputes, only three Circuits—the Ninth, Fifth, and Third (in *J.M.*)—have opined on the rule's extension to child find and eligibility matters and all concur that courts should exclude post-hoc evidence from consideration.

The Ninth Circuit's application of the rule to eligibility disputes aligns with its original adoption of the rule in IEP matters.[191] In *L.J. v. Pittsburg Unified School District*, the Ninth Circuit extended its holding in *Adams v. Oregon*, regarding the appropriateness of a child's Individualized Family Service Plan (comparable to an IEP but for children ages zero to three), to the appropriateness of a school district's special education eligibility determination.[192] The Court held that the Snapshot Rule "instructs the court to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time" of the decision.[193] It added that courts must assess the adequacy of a student's eligibility determination "at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight."[194] The Court concluded, "We judge the eligibility decisions on the basis of whether [the school district] took the relevant information into account, not on whether or not it worked."[195]

Conversely, the Fifth Circuit applies the Snapshot Rule far more stringently in eligibility matters than in IEP matters where it "embraces [post-

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190. *See* discussion *supra* note 20; Fan, *supra* note 20, at 1523 (describing three types of retrospective evidence unique to IEP disputes: "(1) evidence of actual progress, (2) IEPs from subsequent school years, and (3) evidence of how an IEP would have been implemented").

191. *Compare* L.J. *ex rel.* Hudson v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017) (concluding, under the Snapshot Rule, courts assess the appropriateness of an eligibility determination based upon "the information reasonably available to the parties" at the time the decision was made), *with Adams*, 195 F.3d at 1149.

192. *See L.J.*, 850 F.3d at 1004 (applying the *Adams* Snapshot Rule for IFSP matters to special education eligibility matters).

193. *Id.*

194. *Id.* (citing *Adams*, 195 F.3d at 1149).

195. *Id.* (finding that the school district focused on the right time period when assessing the eligibility decision but wrongfully disregarded critical information available to the IEP team about the services the child was receiving *at that time* to help him perform satisfactorily).

hoc] evidence."[196] In *Lisa M. ex rel. J.M. v. Leander Independent School District*, the Court justified treating IEP and eligibility cases differently by distinguishing between the inquiries in which reviewing courts engage when deciding both types of matters.[197] For IEP cases, the court examines four factors to determine appropriateness, namely the individualized nature of the program, the administration of the program in the least restrictive environment, collaboration and coordination amongst "key 'stakeholders'" in service provision, and the demonstration of "positive academic and non-academic benefits."[198] Thus, to determine IEP appropriateness, courts consider district staff's implementation of the IEP as well as student performance,[199] both of which are post-hoc evidence. In contrast, in eligibility cases, courts assess whether students have a qualifying disability and, if yes, "by reason thereof, need [] special education and related services."[200] Per the Fifth Circuit, this appropriateness inquiry involves only "a snapshot of the student's condition at the time of the eligibility determination"; therefore, "incorporating events that occur afterwards would be incongruous and, indeed, can only invite Monday morning quarterbacking."[201] As a result, while reviewing courts must consider post-hoc evidence of IEP implementation and progress in IEP matters,[202] they are barred from considering post-hoc evidence in the eligibility context where "[s]ubsequent events do not determine *ex ante* reasonableness."[203]

The Third Circuit's position on post-hoc evidence consideration in child find and eligibility matters following the recent *J.M. v. Summit Board of Education* decision is murky. Recall that in *Fuhrmann*, which concerned the appropriateness of an IEP, the Third Circuit held that evidence of a child's later educational progress may be considered only as it relates to whether the

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196. *Compare* Lisa M. *ex rel.* J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 214 (5th Cir. 2019) (barring courts from considering post-hoc evidence in eligibility matters), *with* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. *ex rel.* Barry F., 118 F.3d 245, 253 (5th Cir. 1997) (finding "demonstrable academic and non-academic benefits" to the student are significant to determining IEP appropriateness).

197. *See Lisa M.*, 924 F.3d at 214–15.

198. *Id.* at 215.

199. *See id.*

200. *Id.* (quoting Alvin Indep. Sch. Dist. v. A.D. *ex rel.* Patricia F., 503 F.3d 378, 382 (5th Cir. 2007)).

201. *Id.*

202. *Id.* at 214 (citing Hous. Indep. Sch. Dist. v. V.P. *ex rel.* Juan P., 582 F.3d 576, 588 (5th Cir. 2009)).

203. *Id.*

IEP was adequate when it was created.[204] In *Susan N.*, where child find and eligibility were at issue, the Court expanded *Fuhrmann* by holding that after-acquired evidence, such as information received through the experience of an alternative placement, "should be used by courts only in assessing the reasonableness of the district's initial decisions regarding a particular IEP *or the provision of special education services at all*."[205] In *J.M.*, the Third Circuit characterized the issue before the Court as a "dispute about the timing" of a school district's provision of a FAPE to a child with autism, in other words, whether the district denied a FAPE during the fourteen months between first finding the student ineligible and then, later, eligible for special education.[206] In so doing, the Court conflated the student's child find (including a district's duty to locate, identify, and evaluate students with disabilities) and eligibility claims into an issue of child find breach alone.[207] Despite this characterization, both *Susan N.* and *J.M.* concerned the appropriateness of a district's evaluations and eligibility determination. [208]

J.M. concerned a young boy, C.M., who presented with behavioral and academic concerns.[209] At the request of C.M.'s parents, the district performed an initial evaluation and found him ineligible for special education.[210] Thereafter, C.M.'s parents financed IEEs of their son, which diagnosed him with autism and ADHD.[211] Only after the district received copies of the IEEs did it perform additional testing on C.M., which confirmed the diagnoses and resulted, fourteen months later, in the district finding he was IDEA eligible.[212] C.M.'s parents filed for due process against the district, alleging child find,

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204. *See* Fuhrmann *ex rel.* Fuhrmann v. E. Hanover Bd. Educ., 993 F.2d 1031, 1040 (3d Cir. 1993).

205. Susan N. *ex rel.* M.N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3d Cir. 1995) (emphasis added).

206. *See* J.M. *ex rel.* C.M. v. Summit City Bd. Educ., 39 F.4th 126, 130 (3d Cir. 2022).

207. *See id.* at 138 (describing the "denial-of-FAPE claim . . . premised on a child-find violation" as comprised of three elements: "First, the child must have a disability for which he or she needs special education and related services . . . [s]econd, the school district must breach its child-find duty . . . [and] [t]hird, the school district's child-find breach must impede the child's right to a FAPE, or, alternatively . . . 'significantly impede[]' parental participation rights or 'cause[] a deprivation of educational benefits'" (citations omitted)). C.M.'s parents alleged both a child-find breach and that C.M.'s eligibility determination was "manifestly unreasonable." *See id.* at 140–43, 144.

208. *Compare Susan N.*, 70 F.3d at 753–54, 755, *with J.M.*, 39 F.4th at 135. For a detailed summary of the *J.M.* facts and procedural history, see discussion *infra* Part III.

209. *See J.M.*, 39 F.4th at 131–32.

210. *Id.* at 133–35.

211. *See id.* at 135.

212. *See id.*

eligibility, and FAPE violations.[213] Both the hearing officer and district court refused to consider the IEEs obtained after the district's initial eligibility decision but before the due process hearing on the grounds that they were outside the snapshot in time when the disputed ineligibility decision was made.[214]

In a divided (2-1) opinion, the Third Circuit held that, under the Snapshot Rule, courts may, and perhaps even must, summarily exclude post-hoc evidence in disputes concerning the appropriateness of a school district's child find and eligibility decisions.[215] The majority's holding conflicts with that of *Susan N.*[216] and is both ambiguous and internally contradictory. At the very least, the Court held that, "[u]nder the relevance standard, a district court *may* exclude *post hoc* evidence offered to prove a breach of a school district's child find obligation" as irrelevant,[217] i.e., courts are *permitted* to summarily exclude from consideration evidence that post-dates the snapshot in time when the child find issue arose. Alternatively, and even more restrictively, the Court held that post-hoc evidence, such as "a child's behaviors or test results . . . are *not relevant* to whether the school district breached its child find obligations,"[218] i.e., courts *must* summarily exclude such evidence from consideration. Relying upon the rationale set forth by the Ninth and Fifth Circuits in *L.J.* and *Lisa M.*, respectively, the Court concluded, "the child-find duty is based on the 'snapshot of the student's condition at the time of the' school district's child-find determination[]," thus later-acquired evidence must be excluded as irrelevant.[219] While the Court acknowledged that "[l]ater-occurring facts may be relevant to *other* elements of a denial-of-FAPE claim premised on a breach of the child-find duty"—for example, "whether the child had a disability" or "how long or to what degree a school district denied a FAPE to a disabled child"—it determined these elements were not at issue in *J.M.*[220] In so holding, the Court offered no insight into its relevance analysis or determination; indeed, it appears that the sole factor considered in deciding the relevance of the five IEEs ultimately at issue was their dates, and they were dated *after* the child find and eligibility dispute

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213. J.M., N.J. OAL Dkt. No. EDS 10588-16, at 23 (Oct. 12, 2018).

214. *See J.M.*, 39 F.4th at 135–36.

215. *See id.* at 144–45.

216. *Compare id.*, *with* Susan N. *ex rel.* M.N. v. Wilson Sch. Dist., 70 F.3d 751, 758 (3d Cir. 1995) (reversing the lower court's exclusion of post-hoc evidence from consideration).

217. *J.M.*, 39 F.4th at 144 (emphasis added).

218. *Id.* (emphasis added).

219. *Id.* (citation omitted).

220. *See id.* at 144–45 (emphasis added).

arose.[221] Per the *J.M.* Court, where a party introduces evidence, such as evaluation reports, that did not exist at the time of the snapshot—i.e., at the time of the child find or eligibility action, inaction, or decision—such evidence is "not relevant to whether the school district breached its child-find obligations" and subject to automatic exclusion by Third Circuit courts.[222]

Unlike the Ninth and Fifth Circuits, in *L.J.* and *Lisa M.*, respectively, the Third Circuit, in *J.M.*, identified additional support for its post-hoc evidence holding in the language of the IDEA and state special education regulations.[223] First, the majority cited to 20 U.S.C. § 1414(c)(1)(A) when asserting, "[t]he IDEA specifies that a school district's child-find duty requires a review of '*existing* evaluation data on the child'" and concluding, therefore, only existing evaluation data on a child may be considered when assessing if child find has been breached, and any data outside of that "snapshot of the student's condition at the time" of the child find decision is irrelevant and subject to exclusion.[224] Significantly, the Court omitted mention of Subsection (B) of the same provision, which clarifies that the IEP team "shall . . . on the basis of that review and input from the child's parents, *identify what additional data, if any, are needed to determine—(i) whether the child is a child with a disability*."[225] When the Court's cherry-picked language is viewed in context, it is eminently clear that the Act imposes no limit on the kind of evidence that may be considered when determining a child's special education eligibility.[226] The "existing evaluation data" on the child merely serves as a starting point for identifying what other evaluations and data are needed, if any, to complete the child find mandate and determine IDEA eligibility.[227]

Second, the majority relied upon section 6A:14-3.5(c) of the New Jersey Administrative Code, which provides, in relevant part: "Classification shall be based on all assessments conducted, including assessment by child study team members, and assessment by other specialists . . . ."[228] Again, the majority focused on only a select portion of the text to assert that New Jersey special education regulations mandate that eligibility decisions solely "'be

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221. *See id.*

222. *See id.*

223. *See id.* at 144.

224. *Id.* (first quoting 20 U.S.C. § 1414(c)(1)(A); and then quoting Lisa M. *ex rel.* J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 215 (5th Cir. 2019)).

225. *See id.*; *see also* 20 U.S.C. § 1414(c)(1)(B) (emphasis added).

226. *See* 20 U.S.C. § 1414(c)(1)(A)–(B).

227. *See id.*

228. *See J.M.*, 39 F.4th at 144; *see also* N.J. ADMIN. CODE § 6A:14-3.5(c).

based on all assessments conducted' up to the point of decision."[229] Although the regulation requires eligibility determinations to be based upon assessments that were performed, nowhere does this or any other New Jersey regulation provide that an eligibility decision must be based *exclusively* on such assessments.[230] To interpret this provision as strictly as the majority here suggests would allow the child study team to summarily disregard not only any assessments performed after the point of decision *but also any non-assessment information gained prior to determining eligibility*, such as classroom observations, student health or discipline records, parental input, and so forth. Nothing in federal or state special education law, regulations, or history indicates such an intention.[231]

Finally, although not directly relevant to this Article's thesis but adding to the murkiness of the *J.M.* holding, the precedential *J.M.* decision created an intra-Circuit conflict with *Susan N.* that arguably requires courts in the Third Circuit to disregard the post-hoc evidence portion of the *J.M.* ruling as not controlling.[232] Specifically, the *J.M.* Court's holding, that courts may (or must) summarily exclude post-hoc evidence from consideration, is *identical* to the district court's holding in *Susan N.*, that courts have "discretion to summarily exclude altogether the consideration of additional evidence submitted by a party," *which the Third Circuit in Susan N. overturned*.[233]

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229. *See J.M.*, 39 F.4th at 144 (emphasis added) (quoting N.J. ADMIN. CODE § 6A:14-3.5(c)).

230. *See* N.J. ADMIN. CODE § 6A:14-3.5(c); *see also id.* § 6A:14-1.1.

231. *See generally* 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.* (2023); N.J. ADMIN. CODE § 6A:14-1.1; and accompanying legislative and regulatory histories.

232. *Compare J.M.*, 39 F.4th at 144, *with* Susan N. *ex rel.* M.N. v. Wilson Sch. Dist., 70 F.3d 751, 758 (3d Cir. 1995). In both cases, the school districts evaluated the children and found them not eligible for special education; the parents filed for due process alleging inadequate evaluations (child find) and wrongful eligibility determinations resulting in a FAPE denial; the parents asked that additional evidence and testimony be heard by the court; and at issue was whether courts must consider post-hoc evidence where the adequacy of a child's special education evaluations and eligibility decision are in dispute. *Compare J.M.*, 39 F.4th at 130–35, 139, *with Susan N.*, 70 F.3d at 753–55, 758. The additional evidence in *J.M.* was obtained after the eligibility determination but before the due process hearing, *see* 39 F.4th at 135, and, in *Susan N.*, was obtained after the due process hearing but before the district court action, *see* 70 F.3d at 755, is of no significance because the IDEA allows for the presentation of evidence at the due process hearing and additional evidence in a civil action. *See* 20 U.S.C. § 1415(h)(2), (i)(2)(C)(ii).

233. *Compare J.M.*, 39 F.4th at 144–45, *with Susan N.*, 70 F.3d at 758. Third Circuit Judge Greenaway embraced this very position in his *J.M.* dissent, finding that the lower court's "failure to meaningfully consider the post-hoc evidence based on the Snapshot Rule constitutes error" under *Susan N. See J.M.*, 39 F.4th at 151 (Greenaway, J., dissenting). The *J.M.* majority responded by asserting that the Act prevents "extend[ing] precedent from other areas of IDEA jurisprudence to the child-find context," despite that the Third Circuit did exactly that in *Susan N. See J.M.*, 39 F.4th at 145 n.13.

Third Circuit Internal Operating Procedures provide, "[T]he holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel."[234] As such, the *Susan N.* holding regarding post-hoc evidence consideration in child find and eligibility matters is still binding.

Despite lingering important questions about *J.M.*'s nebulous holding and precedential value and authority, the opinion offers a prime example of the adverse effects of the Snapshot Rule's application on children in child find and eligibility disputes. For this reason, this Article uses the decision as a vehicle to present and discuss the unjust and preposterous outcomes resulting from the summary exclusion of post-hoc evidence in Part IV below.

The origin and evolution of the Snapshot Rule demonstrate how, in some Circuits, the original guiding principle against deciding special education cases *exclusively* in hindsight and treating post-hoc evidence as *automatically* dispositive has transformed into a rigid rule banning post-hoc evidence consideration altogether in child find and eligibility disputes. "[E]vidence is a party's arsenal and . . . more or less, good or bad, directly influences outcomes."[235] By disallowing post-hoc evidence into consideration, the Ninth, Fifth, and, now, Third Circuits preclude countless parents of children with disabilities from proving a school district violated the Act and denied their child a FAPE, harming the very persons Congress aimed to protect in enacting the IDEA.

III. THE UNLAWFULNESS AND ADVERSE EFFECTS OF THE SNAPSHOT RULE IN CHILD FIND AND ELIGIBILITY MATTERS

Circuits' adoption of a rigid Snapshot Rule that calls for the summary exclusion of post-hoc evidence in child find and eligibility disputes conflicts with foundational principles of IDEA jurisprudence, procedural due process, and basic notions of fairness, erroneously depriving children of their special education IDEA rights and remedies and causing disproportionate harm to families with limited financial means.[236] Adding fuel to the fire, the rule also creates a liability loophole for school districts that insulates them from scrutiny for malfeasance, defying logic and common sense.[237] As such, a new

234. 3d Cir. I.O.P. 9.1 (2018).
235. See Fan, *supra* note 20, at 1506 (footnotes omitted).
236. *See* discussion *infra* Part III.
237. *See* discussion *infra* Section III.D.

evidentiary standard is necessary to safeguard the rights and remedies available to the Act's intended beneficiaries.

A. The Snapshot Rule Deprives Children of the Right to an Independent Educational Evaluation ("IEE")

The IEE plays a significant role in child find and eligibility disputes by providing parents the opportunity to obtain an independent and unbiased assessment of their child's disability and needs at the school district's expense. For many parents, the IEE is the primary and, for some, only evidence demonstrating that a district violated the IDEA and denied the child a FAPE. Courts' summary exclusion of post-hoc evidence deprives the IEE of evidentiary weight or value in proving an IDEA violation because in most, if not all, cases, the IEE is obtained after the snapshot in time when the dispute arose and, thus, is post-hoc.

The Supreme Court emphasized the IEE's critical import in *Schaffer v. Weast*, finding that "[s]chool districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents," including "the right to an 'independent educational evaluation of [their] child.'"[238] Districts' "natural advantage" derives from the wealth of professionals from a variety of disciplines (e.g., teachers, school psychologists, social workers, occupational and physical therapists, learning disabilities teaching consultants, etc.) they employ, or with whom they contract, to teach, evaluate, provide therapies and services to, and consult regarding children with disabilities.[239] Districts have ready access to these professionals, who possess experience and/or expertise in their respective fields, as their employees and/or paid contractors, and provide them with ready access to students.[240] Although these professionals are expected to perform their duties without bias and keep students as the central focus, the potential for conflicts of interest to arise regarding professionals' allegiance, due to the nature of the employee (professional)-employer (school district)-student relationship, is

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238. *See* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 60–61 (2005) (first quoting Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 372 (1985); and then quoting 20 U.S.C. § 1415(b)(1)).

239. *See, e.g.*, Lascari *ex rel.* Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989) ("The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. . . . By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.").

240. *See id.*

great.[241] The professionals may refrain from advocating for a FAPE for a child because of employees' fear of losing their jobs or being transferred to a less desirable worksite, or contractors' concern that referrals will cease if they speak out against the district.[242] Due to the perceived risk of negative repercussions to these professionals for their advocacy on behalf of children, they typically resolve conflicts of interest in school districts' favor, adding to the "natural advantage" districts already possess.[243] Further augmenting this natural advantage is the fact that districts create, collect, and maintain most, if not all, of students' educational records that serve as evidence in special education due process hearings, including child study team evaluations, IEPs, report cards, progress reports, discipline records, standardized test records, etc.[244] Districts' creation, ownership, and possession of crucial, and often times the only, evidence further tips the advantage scale in their favor.

Acknowledging the power imbalance between districts and parents in special education matters, the Supreme Court in *Rowley* concluded "the importance" of the Act's procedural protections "cannot be gainsaid."[245] Decades later, in *Schaffer*, the Court found that the IDEA's safeguards, particularly the IEE, level the playing field by assuring parents "are not left to challenge the government *without a realistic opportunity to access the necessary evidence*, or *without an expert with the firepower to match the opposition*."[246] Importantly, the Court appears to presume that parents have an automatic right to an IEE at public expense upon request, stating, with the IEE, the "IDEA *thus ensures parents access to an expert* who can evaluate all the materials that the school must make available, and who can give an

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241. This statement is based on the Author's twenty plus years of experience representing students with disabilities in special education matters, including situations where district professionals have confided in the Author privately that they believe a child is not receiving a FAPE but refrain from expressing their opinions outright due to fear of losing their job or being otherwise penalized for speaking out against a district. *See also* MaryJo Ginese, *Speaking Up for Students with Disabilities*, UNITED FED'N OF TCHRS. (Nov. 3, 2022), https://www.uft.org/news/opinion/vperspective/speaking-students-disabilities [https://perma.cc/D7UG-ZS39].

242. *See id.*

243. This statement is based on the Author's twenty plus years of experience representing students with disabilities in special education matters. *See also* Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 114–15 (2011).

244. *See, e.g.*, *Lascari*, 560 A.2d at 1188 ("Through the child-study team, the board generally has extensive records pertaining to a handicapped child.").

245. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982).

246. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 61 (2005) (emphasis added).

independent opinion."[247] However, this assumption is false.[248] An IEE at public expense is not guaranteed; districts may, and often do, contest parent requests for an IEE at public expense, requiring parents to fight to obtain the IEE in a due process hearing where ALJs may, and frequently do, deny this relief.[249] It may take parents months, and sometimes years, to get an ALJ decision.[250] Moreover, it may take months to get the IEE performed for reasons such as backlogs in provider scheduling, payment issues, and/or time needed to obtain board approval of the evaluator, even where a school district agrees to perform an IEE.[251]

Against this backdrop, recall that in order to obtain an IEE, a parent must disagree with a district evaluation.[252] Such a disagreement may occur during child find, for example, where a child is referred for an evaluation but the district decides, against the parent's wishes, an evaluation is unwarranted, or where a parent disputes the type(s) of assessments the district wants to perform or qualifications of an evaluator. Or, it may occur at the eligibility stage where, for example, a parent contests the quality and/or appropriateness of a district-performed evaluation; a district determines that a child is not disabled or does not need special education; or the proper eligibility classification is disputed. Regardless of the reason, parents must wait until

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247. *See id.* at 60–61.

248. *See* 34 C.F.R. § 300.502(b) (2023).

249. This statement is based on the Author's twenty plus years of representing students with disabilities in special education matters. *See* William H. Blackwell & Mertie Gomez, *Independent Educational Evaluations as Issues of Dispute in Special Education Due Process Hearings*, 4 J. HUMAN SERVS., Feb. 2019, at 1, 14, 20 (finding that school districts prevailed in sixty-seven percent of due process hearings in a sample collected from fourteen states from 2014–2016); DAVID D. GARNER, INDEPENDENT EDUCATIONAL EVALUATIONS: YOUR TOP 10 QUESTIONS ANSWERED! 11 (2018), https://cdn-files.nsba.org/s3fs-public/01_04_Top_IEE_Questions_RV_Garner.pdf [https://perma.cc/U7GQ-G5X7] (suggesting that an ALJ can deny an IEE at public expense if schools can show "that their own assessments were comprehensive, nondiscriminatory, and otherwise complied with the requirements of the IDEA with respect to evaluations").

250. *See* Diane M. Holben & Perry A. Zirkel, *Due Process Hearings Under the Individuals with Disabilities Education Act: Justice Delayed . . .* , 73 ADMIN. L. REV. 833, 856–57 (2021) (finding the average duration of a fully adjudicated special education hearing far surpassed the 45-day timeline, with some states, including Tennessee, New Jersey, Arizona, and Kentucky, *averaging* more than 300 days for a hearing).

251. This statement is based on the Author's twenty plus years of representing students with disabilities in special education matters. *Cf.* Erin O'Connell, *Backlogs of SPED Evaluations—What Will Schools Do?*, LIGHTHOUSE THERAPY (May 13, 2021), https://lighthouse-therapy.com/backlog-of-sped-evaluations-what-will-schools-do/ [https://perma.cc/Z4UK-V4YF] (noting that some students "have been waiting over a year" for special education evaluations).

252. *See* 34 C.F.R. § 300.502(b)(1) (2023).

after a school district's evaluation-related decision, action, or inaction, that is, snapshot, to request an IEE at district expense.[253] Even if the IEE is financed privately by a parent or through health insurance (presuming a child is insured and the assessment is covered), a parent seldom obtains one *before* a dispute arises.[254] IEE reports, therefore, (almost) always are post-hoc evidence and, thus, subject to summary exclusion in Circuits that stringently apply the Snapshot Rule.

Notably, federal special education regulations provide that an IEE (whether publicly or privately funded) "*may be presented by any party as evidence at a hearing*";[255] accordingly, courts' summary exclusion of IEEs as post-hoc evidence in child find and eligibility disputes violates federal regulations. Summary exclusion of post-hoc evidence also renders parents' statutory right to an IEE meaningless when being used to obtain a remedy for a district's past violation of the Act.[256] Exclusion of this evidence strips children with disabilities and their parents of an indispensable tool that levels the playing field and counters districts' "natural advantage," in violation of Supreme Court precedent.[257] Further, requiring parents to incur financial expenditures to obtain IEEs privately, so that they have ammunition ready before (and just in case) a dispute arises, contravenes a core purpose of the IDEA: "The Act was intended to give handicapped children both an appropriate education and a *free* one; it should not be interpreted to defeat one or the other of these objectives."[258] Finally, expecting parents to *presume* a district will act improperly or fail to act, and to suitably arm themselves with the ammunition needed to protect their children *if* a dispute arises, runs directly counter to the longstanding position in many Circuits that "a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the

253. *See id.*

254. In the absence of a dispute over a district evaluation, parents would have to "front" the costs of the IEE. *See infra* notes 323–327 and accompanying text.

255. 34 C.F.R. § 300.502(c)(2) (2023) (emphasis added).

256. The IEE still may be considered by a court where a parent seeks present or future relief.

257. *See* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 60–61 (2005); *see also* Z.B. v. District of Columbia, 888 F.3d 515, 526 (D.C. Cir. 2018) ("Sometimes a belatedly obtained professional opinion, for example, may suggest a longstanding problem that a school should have but failed to identify and account for earlier.").

258. Sch. Comm. of Burlington v. Dep't. of Educ., 471 U.S. 359, 372 (1985) (emphasis added) (holding reimbursement is an available remedy for private school expenses incurred by parents where a district has denied a FAPE, and the private school is found appropriate).

problem),"[259] and to the cooperative and collaborative spirit between parents and school districts that the IDEA promotes and on which the law is based.[260]

B. The Snapshot Rule Denies Children the Right to a Fair Hearing

The Ninth, Fifth, and Third Circuits' application of the Snapshot Rule to summarily exclude post-hoc evidence in child find and eligibility disputes restricts parents' ability to put on an affirmative case demonstrating a school district violated the Act and denied a student a FAPE, significantly hampering parents' chances of a favorable decision. Post-hoc evidence exclusion is far more than a simple issue of evidence admissibility; it goes to the heart of the IDEA's procedural safeguards and the nature and function of procedural due process as intended by Congress. By excluding such evidence summarily, these Circuits render worthless not only the right to an IEE but also other IDEA procedural safeguards, including parents' rights to present a complaint, to present evidence in a due process hearing and have additional evidence heard by the court in a civil action, and hence to have a full and fair hearing and obtain a complete remedy for district wrongdoing.

The right to a fair hearing is a basic requirement of procedural due process.[261] The Fourteenth Amendment provides that states and local governments may not "deprive any person of life, liberty, or property without due process of law."[262] Public education is a recognized property interest to which students have a "legitimate claim of entitlement."[263] In addition, students with disabilities have "an enforceable substantive right to public education" in states accepting federal IDEA funding.[264] This includes a "congressionally mandated right to a [FAPE] . . . as well as the[] right to have

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259. *See, e.g.*, M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) (holding the right to compensatory education for a district's FAPE denial does not depend upon parental vigilance); Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917, 926 (11th Cir. 2015) (citing *M.C.*, 81 F.3d at 397) (finding a district is not absolved of the child find duty where a parent does not request an evaluation).

260. *See Schaffer*, 546 U.S. at 53 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 205–06 (1982)).

261. *See* Goss v. Lopez, 419 U.S. 565, 578–79 (1975) (noting a fundamental requirement of the 14th Amendment due process clause is the opportunity to be heard).

262. U.S. CONST. amend. XIV, § 1. Protected property interests typically are "'created and . . . defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss*, 419 U.S. at 572–73 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). Where a person has a "legitimate claim of entitlement" to property, the person has a right to due process procedural protections. *See id.* at 573.

263. *See Goss*, 419 U.S. at 573.

264. Honig v. Doe, 484 U.S. 305, 310 (1988).

that education provided in accordance with the procedures set out in the [Act]."[265] As stated previously, these procedures include the right to a full and fair due process hearing where disputes between parents and school districts arise.[266]

A fundamental mandate of due process of law is the opportunity for a party to be heard;[267] this typically occurs through the presentation of evidence. Evidence is deemed relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" where "the fact is of consequence in determining the action."[268] In IDEA matters, evidence provides "a more complete picture of a child's educational landscape" that "promote[s] more grounded and sensible judicial decision making."[269] The summary exclusion of evidence risks losing relevant and helpful information and data needed to properly judge a case.[270] Moreover, "[w]hen a student is denied IDEA services based on inadequate or incomplete evidence provided to the [school district or ALJ], the student is denied their statutory right to a [FAPE] until this mistake is corrected."[271]

Nothing in the IDEA's plain language expressly limits the fair hearing rights of children with disabilities and their parents and, as stated previously, nowhere does the Act restrict, let alone bar, courts' consideration of any type of evidence.[272] Further, nothing in the Act's legislative or regulatory history indicates any intention of Congress or the executive branch, respectively, to limit the evidence presented in an IDEA due process hearing or the additional evidence heard at trial. The Act's evidentiary protections date back to the EAHCA, the original 1975 version of the Act.[273] The EAHCA's procedural

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265. *Id.* at 316.

266. *See generally* 20 U.S.C. § 1415(h)–(i).

267. *See Goss*, 419 U.S. at 579.

268. FED. R. EVID. 401. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." FED. R. EVID. 401 advisory committee's note.

269. *See* Fan, *supra* note 20, at 1542.

270. *See* Sydney Doneen, *Education Law—IDEA Eligibility: Hindsight is 20/20*—Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205 (5th Cir. 2019)*, 27 SUFFOLK J. TRIAL & APP. ADVOC. 195, 204 (2022) ("When the court fails to hear additional evidence regarding a student's IDEA eligibility, the likelihood of correcting an inappropriate ruling by the committee or [hearing officer] significantly decreases.").

271. *Id.* at 203–04.

272. *See generally* 20 U.S.C. § 1400 *et seq.*; Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296–97 ("When the statutory 'language is plain, the sole function of the courts . . . is to enforce it according to its terms.'" (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000))).

273. *See generally* An Act To Amend the Education of the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

safeguards section largely was based upon the consent decrees entered in the *Mills* and, to a lesser extent, *Pennsylvania Association for Retarded Children* cases.[274] These cases "provide[d] for extensive rights to present evidence . . . *with no suggestion that these rights should be conditional or qualified in any way*."[275] Indeed, the only limits on courts' consideration of evidence come not from the IDEA itself but from the evidentiary rules of court governing the forum in which the case is heard, typically mandating that evidence meet admissibility standards.[276]

The dual purpose of an IDEA due process hearing, which is to "develop[] a *complete* factual record" and to "reach[] a prompt, expert decision,"[277] aligns with the notion that evidentiary rights should not be restricted. As stated previously, the Supreme Court has held that IDEA due process hearings are "deliberately informal" so that ALJs have the flexibility needed to ensure each side fairly presents its case.[278] Indeed, "[t]he nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions" such that all evidence, expertise, and judgment will have come to light by the time the dispute reaches court.[279] Further, "the fact finding role of the hearing officer is the heart of the process," and the hearing officer's role is to "hear all evidence."[280] This can happen only if the parties in a due process hearing have the opportunity to present their evidence with minimal restrictions. To encourage openness and flexibility in the administrative dispute resolution process, states, like New Jersey, have enacted laws providing the rules of evidence, whether statutory, common law, or adopted by the Rules of Court, do not apply to administrative hearings.[281] Thus, in New Jersey and similarly situated states, federal court

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274. *Compare id.*, *with* Mills v. Bd. of Educ., 348 F. Supp. 866, 877–83 (1972), *and* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1258–68 (1971).

275. David Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. 40, 133–34 (1974) (emphasis added).

276. *See, e.g.*, FED. R. EVID. 401–03 (providing evidence must be relevant and not outweighed by countervailing considerations, such as, prejudice, duplication, or privilege); N.J. ADMIN. CODE § 1:1-15.1(c) (2023) (stating parties in contested administrative cases are not bound by statutory or common law rules of evidence or N.J. Rules of Evidence except as provided in state administrative rules).

277. Krahmal et al., *supra* note 111, at 219–20 (emphasis added).

278. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 61 (2005).

279. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386, 404 (2017).

280. Clark, *supra* note 103, at 825, 829.

281. N.J. STAT. ANN. § 52:14B-10(a)(1) (West 2023) ("All relevant evidence is admissible, except as otherwise provided herein. The administrative law judge may, in his discretion, exclude any evidence if he finds that its probative value is substantially outweighed by the risk that its

decisions like *Lisa M. ex rel. J.M.*, which concern the admission of evidence, a procedural law issue, have no precedential authority and should not be applied to restrict the admission of evidence in special education due process matters. Instead, any party to a due process hearing has the right to present evidence, *including an IEE obtained at public or private expense*;[282] and all relevant evidence is admissible, except as otherwise provided, and must be considered to ensure the development of a complete factual record so that a proper judgment is rendered.[283]

Despite the essential need for broad consideration of post-hoc evidence in child find and eligibility disputes, the Ninth, Fifth, and Third Circuits in *L.J.*, *Lisa M.*, and *J.M.*, respectively, improperly permit courts to prejudge the probative value of, and exclude, post-hoc evidence based solely on its date.[284] The Ninth and Fifth Circuits call for automatic rejection of post-hoc evidence in child find and eligibility disputes on temporal grounds.[285] In contrast, the Third Circuit in *J.M.* allegedly excluded the post-hoc evidence on relevance grounds; however, it offered no analysis or rationale for deeming the IEEs (and related expert testimony) at issue irrelevant.[286] As such, the *J.M.* Court's reliance upon relevance as justification for the summary exclusion of post-hoc evidence appears to be little more than a pretext while this Court, too, espouses the exclusion of evidence when it is temporally outside the snapshot.[287] In so holding, these Circuits deny children due process and a fair hearing.[288]

The Supreme Court has held that if one of the IDEA's provisions is interpreted as "cut[ting] off parental rights . . . the principal purpose of the Act will in many cases be defeated in the same way as if [the right] were never available."[289] Courts' summary exclusion of post-hoc evidence from

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admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion.").

282. 20 U.S.C. § 1415(h)(2); *see also* 34 C.F.R. § 300.502(c)(2) (2023).

283. *See, e.g.*, N.J. STAT. ANN. § 52:14B-10(a) (West 2023); *see also* Krahmal et al., *supra* note 111, at 219–20.

284. *See generally* discussion *supra* Section I.D.

285. *See* L.J. v. Pittsburg Unified Sch. Dist., 850 F.3d 966, 1004 (9th Cir. 2017); Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 215 (5th Cir. 2019).

286. J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 144 (3d Cir. 2022). The district court in *J.M.* similarly failed to provide such a rationale. *See* J.M. v. Summit City Bd. of Educ., No. 19-00159, 2020 WL 6281719, at * 7 (D.N.J. Oct. 27, 2020).

287. *See J.M.*, 39 F.4th at 144.

288. *See, e.g.*, Kaur v. Ashcroft, 388 F.3d 734, 738 (9th Cir. 2004) (holding the lower court's prejudgment of witness credibility and the probative value of witness testimony violates due process and potentially affects the case outcome).

289. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 372 (1985).

consideration cuts off several IDEA rights, including the rights to present evidence and have it heard. If the presentation and hearing of evidence is curtailed, so too is the ability of parents to put on an affirmative case, rendering the right to present a complaint concerning the identification, evaluation, or eligibility determination of a child with a disability futile. Consequently, in summarily excluding post-hoc evidence in child find and eligibility disputes, the Ninth, Fifth, and Third Circuits have "defeated" the "principal purpose" of the IDEA, which is to provide a FAPE to eligible children and ensure their rights are protected.[290]

Finally, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"[291] According to the Supreme Court, "education is perhaps the most important function of state and local governments."[292] For children with disabilities erroneously denied a FAPE, "[t]he risk of error is not at all trivial."[293] The Ninth, Fifth, and Third Circuits' application of the Snapshot Rule to summarily exclude post-hoc evidence in child find and eligibility matters prevents hearing officers and the courts from making informed judgments on the merits, and denies children a full and fair hearing and procedural due process, causing harm, sometimes lifelong, to children with disabilities wrongfully denied a FAPE.[294]

C. The Snapshot Rule Deprives Children of the Right to a Complete Remedy

"It is a settled and invariable principle, that every right, when withheld, must have a remedy . . . ."[295] Permitting courts to summarily disallow evidence needed to demonstrate a school district failed in its FAPE obligation on the grounds that the evidence was not available at the time of the "snapshot" deprives children of the ability to obtain a complete remedy where a district has violated the Act. Congress has acknowledged the "paramount importance" of appropriately identifying, evaluating, and providing a FAPE

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290. *Id.*; *see also* 20 U.S.C. § 1400(d)(1).

291. Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (citing Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)).

292. Goss v. Lopez, 419 U.S. 565, 576 (1975) (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

293. *Id.* at 580; *see also* Issa v. Sch. Dist., 847 F.3d 121, 143 (3d Cir. 2017); Plyler v. Doe, 457 U.S. 202, 221 (1982).

294. *Issa*, 847 F.3d at 143.

295. Marbury v. Madison, 5 U.S. 137, 147 (1803).

to eligible children.[296] The Act's remedial purpose is clear: "In order to effectuate the law's broad remedial goals, a court finding a deprivation of a [FAPE] should return a child to the educational path he or she would have traveled had the educational agency provided that child with an appropriate education in the first place."[297] To achieve this remedial purpose, the IDEA accords courts broad discretion and authority to "grant such relief as [they] determine[] appropriate."[298]

Neither the text nor the history of the IDEA indicates that relief available under the Act is limited.[299] For nearly thirty years, the U.S. Supreme Court has interpreted the IDEA in an expansive manner and advanced the position that Congress, in enacting the statute, did not intend to create a right without a meaningful remedy.[300] Similarly, the Circuits have interpreted courts' remedial authority under the IDEA broadly,[301] including holding that "when a school district has failed in [its child find] responsibility . . . that child is entitled to be made whole with nothing less than a 'complete' remedy."[302] This expansive view of courts' remedial authority extends to the context of IEEs as well.[303]

In accordance with this broad view of the right to a remedy under the IDEA, the Supreme Court has refused to read limitations into the Act not

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296. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245 (2009) (concluding that denying "an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services").

297. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 620 (3d Cir. 2015).

298. *Id.* at 618 (quoting 20 U.S.C. § 1415(i)(2)(C)(iii)).

299. *See id.*

300. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) ("The ordinary meaning of these words confers broad discretion on the court.").

301. *See, e.g.*, Lester H. *ex rel.* Octavia P. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990) (holding courts may grant compensatory education as a remedy because Congress "did not intend to offer a remedy only to those parents able to afford an alternative private education"); *see also* Miener *ex rel.* Miener v. Missouri, 800 F.2d 749, 752–53 (8th Cir. 1986) ("[C]ongress did not intend [a] child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs."); *G.L.*, 802 F.3d at 605 (holding that there is no cap on the remedy for timely filed IDEA claims).

302. *G.L.*, 802 F.3d at 625; *see also* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 244–45 (2009).

303. *See, e.g.*, Warren G. *ex rel.* Tom G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 87 (3d Cir. 1999) (holding that a parent's failure to disagree with a district's evaluation before obtaining an independent evaluation does not foreclose the right to reimbursement because "the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's").

expressed by Congress.[304] For example, in *Winkelman v. Parma City School District*, when addressing whether parents have enforceable rights separate from the rights of their children under the IDEA, the Court refrained from reading restrictions into the statute, noting, "the Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them."[305] Similarly, in *Forest Grove School District v. T.A.*, the Court found that statutory provisions regarding tuition reimbursement are "best read as elucidative" and not "exhaustive," and refused to read any restrictions into the IDEA not stated by Congress.[306]

Despite precedential case law, the Ninth, Fifth, and Third Circuits read limits into the IDEA that do not exist in the statutory language.[307] As discussed above, Congress imposed no restrictions on courts' consideration of evidence in special education dispute resolution under the IDEA.[308] The Act's procedural safeguards mandate a fair hearing at which parties have the right to present evidence and courts must hear additional evidence at the request of a party.[309] By restricting the fair hearing rights of children, these Circuits foreclose the availability of a remedy for the violation of a statutory right, i.e., FAPE, in contravention to the Act.

D. The Snapshot Rule Defies Logic and Common Sense

Courts' application of the Snapshot Rule to summarily exclude post-hoc evidence in child find and eligibility matters "border[s] on the irrational"[310] with perverse effects: It leaves children without an adequate remedy where a district fails to obtain any evaluation data (i.e., denies a child study team evaluation) or obtains inadequate evaluation data (i.e., the evaluation is not comprehensive and appropriate), because the primary, if not only, means for parents to prove these claims is through post-hoc evidence. [311] Such a rule is

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304. *See, e.g.*, *Forest Grove*, 557 U.S. at 242 ("The clauses of § 1412(a)(10)(C) are thus best read as elucidative rather than exhaustive.").

305. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 527–29 (2007).

306. *See Forest Grove*, 557 U.S. at 242.

307. *See, e.g.*, J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 144 (3d Cir. 2022); Lisa M. *ex rel.* J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 214 (5th Cir. 2019); L.J. *ex rel.* Hudson v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017).

308. *See supra* Section II.B.

309. *See* 20 U.S.C. § 1415(h)–(i) (2005).

310. *See Forest Grove*, 557 U.S. at 245.

311. *See J.M.*, 39 F.4th at 144. In opining that "the irrelevance of post-hoc evidence . . . does not legitimatize cursory evaluations," the *J.M.* court disregards that post-hoc evidence is often essential to prove a child-find violation. *See id.* at 145 n.13.

akin to the categorical bar to tuition reimbursement for students who did not previously receive special education through the public school system, which was deemed faulty by the Supreme Court in *Forest Grove*.[312] There, the Court noted:

> It would be particularly strange . . . to provide a remedy . . . when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether.[313]

The same concern holds true here. The less information a school district has when it makes an evaluation or eligibility decision, the more likely parents will need to obtain additional evidence through IEEs and observations of their child to counter the district's decision. Most, if not all, of this evidence will be post-hoc. Summary exclusion of post-hoc evidence from consideration immunizes school districts from liability and, contrary to the longstanding principle—*ex turpi causa non oritur actio*[314]—allows school districts to benefit from their own wrongdoing regardless of intent. "To comply with the IDEA, a school district . . . must still be held responsible for its past transgressions" and should not be permitted to "create an enormous loophole in that obligation and thereby substantially weaken the IDEA's protections."[315] Yet that is exactly what the Ninth, Fifth, and Third Circuits have done.

Third Circuit Judge Greenaway embraced this very argument in his dissent in *J.M.*, stating, "I fear that we may have created a loophole that undermines the IDEA's purpose and insulates school districts from liability under the IDEA."[316] He found that the majority's holding "gives school districts perverse incentives" by encouraging districts "to conduct cursory evaluations in the first instance without concern for liability . . . in order to save time and

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312. *See Forest Grove*, 557 U.S. at 247 (holding that such a reading of the Act "would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services").

313. *Id.* at 245.

314. Christos P. Kinanis & Vicky Papavarnava, *The Defence of Illegality—"*Ex Turpi Causa Non Oritur Actio*"—The Cyprus Approach*, LEGAL 500 (Jan. 13, 2022), https://www.legal500.com/developments/thought-leadership/the-defence-of-illegality-ex-turpi-causa-non-oritur-actio-the-cyprus-approach/ [https://perma.cc/E2Y6-E5DP] (defining the phrase as no person should benefit from their own wrongdoing).

315. D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 497–98 (3d Cir. 2012) (holding that a child's out-of-district move, even if out of state, does not nullify compensatory education claims or the district's duty to provide a remedy for past wrongs).

316. *J.M.*, 39 F.4th at 148 (Greenaway, J., dissenting).

resources."[317] Judge Greenaway added that later evaluations obtained by a parent may reveal deficiencies in the district's cursory evaluation, but, under *J.M.*, the "district would be insulated from liability, and the child will have sustained years of an inadequate education with no recourse."[318] The panel majority minimized Judge Greenaway's concern, stating, "[T]his Circuit's jurisprudence already recognizes that if a school district conducts 'a poorly designed and ineffective round of testing' or fails to evaluate a child when 'school officials are on notice of behavior that is likely to indicate a disability,' then the school district breaches its child-find obligation."[319] However, the majority missed the point entirely: Without post-hoc evidence, parents often cannot demonstrate a child find or eligibility breach occurred; its summary exclusion precludes parents from presenting their proofs and denies adequate recourse.

E. The Snapshot Rule Harms All Children, but Disproportionately Affects Those in Households with Limited Financial and Other Resources

Although the IDEA provides a detailed framework of special education rights to safeguard the interests of *all* children with disabilities, those living in households with limited financial and other resources frequently experience significant challenges in accessing those rights.[320] For example, power imbalances arising from differences in parents' education level and literacy skills, immigration status, knowledge of special education law and process (including technical jargon), and access to discipline-specific expertise impede parental participation and further perpetuate the unequal playing field that favors districts.[321] Under-resourced families experience great difficulty obtaining free or low-cost legal counsel despite that "legal representation is one of the greatest determinants of success in a special

317. *Id.* at 151.

318. *Id.*

319. *Id.* at 145 n.13 (majority opinion) (quoting D.K. *ex rel.* Stephen K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d. Cir. 2012)).

320. *See, e.g.*, Eric Emerson, *Poverty and People with Intellectual Disabilities*, 13 MENTAL RETARDATION & DEV. DISABILITIES RSCH. REVS. 107, 109 (2007); Carla A. Peterson et al., *Meeting Needs of Young Children at Risk for or Having a Disability*, 37 EARLY CHILDHOOD EDUC. J. 509, 512 (2010).

321. *See* Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 FORDHAM URB. L.J. 599, 619 nn.104–06 (2013).

education due process hearing."[322] Moreover, most low-income and indigent families are unable to "front" the cost of IEEs and experts to assess and observe their children; IEEs can range from several hundred to several thousand dollars depending upon the nature and severity of the child's needs and the type(s) of assessments required.[323] Courts' summary exclusion of post-hoc evidence under the Snapshot Rule and the liability loophole created by the rule further exacerbate these power imbalances and perpetuate an already inequitable, two-tiered IDEA remedial scheme—one for children with disabilities with financial and other resources and one for those without.[324] Importantly, low-income families are disproportionately likely to have a child with a disability, for children in the bottom twenty percent of household income distribution have the highest disability rate.[325]

As explained, children have no right to an IEE at a school district's expense unless and until their parents disagree with a district evaluation.[326] Where districts erroneously refuse to evaluate children, perform inadequate evaluations, or improperly determine them ineligible for special education, and parents cannot "front" IEE costs, they are burdened with the time-consuming process of obtaining IEEs at district expense. Depending on a family's health insurance, the type of evaluation(s) needed, and the time it

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322. *Id.* at 622 ("[P]arents won approximately 50% of special education due process hearings when represented by a lawyer; without legal representation, they won only 16.8% of hearings."); *see also* William H. Blackwell & Vivian V. Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*, SAGE OPEN, Jan.–March 2015, at 1, 10 ("Massachusetts school districts utilized attorney representation and won due process hearings at notably higher levels than parents."); Blackwell & Gomez, *supra* note 249, at 21 ("[T]he financial costs of attorney representation are a primary barrier to accessing qualified legal representation for many parents.").

323. This statement is based upon the Author's twenty plus years of experience representing parents of children with disabilities in special education matters, including IEE disputes. *See* Donald Stone, *David v. Goliath: Due Process Hearings and the Uphill Battle Parents of Disabled Students Face*, 43 U. HAW. L. REV. 205, 227 (2020) ("Although parents are permitted to obtain an independent educational evaluation of their child as an alternative opinion to the school officials' recommendations, securing an independent evaluation is very difficult for parents with limited financial resources."); Sarah Carr, *Want Your Child To Receive Better Reading Help in Public School? It Might Cost $7,500*, HECHINGER REP. (March 1, 2022), https://hechingerreport.org/an-independent-neuropsych-evaluation-is-critical-for-getting-access-to-special-education-services/ [https://perma.cc/PEB6-E4GY].

324. *See* Valverde, *supra* note 321, at 624–31 (contrasting the remedies of tuition reimbursement and compensatory education and their inequitable effects on children).

325. *See* NATALIE A.E. YOUNG, CHILDHOOD DISABILITY IN THE UNITED STATES: 2019, at 11 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-006.pdf [https://perma.cc/62XD-TMG6].

326. 34 C.F.R. § 300.502(b)(1) (2023).

takes the district to reevaluate the child, it can take years to obtain an IEE.[327] These children are at a distinct disadvantage compared to their well-resourced peers because they *seldom, if ever*, have additional evidence *at the time of the snapshot*. Instead, their evidence is obtained post-hoc and subject to summary exclusion.

Some parents are financially able to unilaterally place their child in a private school or obtain private services for the child and seek reimbursement from the district so that the child receives an appropriate education during the dispute resolution process.[328] Children whose families cannot "front" the cost of appropriate services and private school programs typically remain in inadequate educational placements for months or years before obtaining a remedy for a violation of their IDEA rights.[329] These families rely disproportionately on compensatory education (i.e., make-up education) to remedy FAPE denials as opposed to reimbursement of monies paid; however, this remedy may never make up for the educational deprivation children with disabilities experienced.[330] By stripping away the evidentiary power of the IEE, which typically is the *only* "firepower" children without financial resources have to counter the district's "natural advantage," the Ninth, Fifth, and Third Circuits perpetuate the IDEA's inequitable remedial scheme.[331]

Delays in the receipt of appropriate special education and related services for children with disabilities can have significant adverse effects on their education, development, growth, functioning, and overall well-being as well.[332] While all children with disabilities experience adverse developmental and educational effects from FAPE delays and denials, children residing in households that are low-income or poor, and who are unable to front the cost of appropriate programs and services while disputes are ongoing, are disproportionately harmed.[333] Studies have found that the timing, duration, and appropriateness of interventions are critical to the successful remediation

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327. This statement is based upon the Author's twenty plus years of experience representing parents of children with disabilities in special education matters, including IEE disputes. *See* Carr, *supra* note 323.

328. Valverde, *supra* note 321, at 630.

329. *Id.* at 630–31; *see also* Holben & Zirkel, *supra* note 250, at 856 (finding that some states *average* more than 300 days for a fully adjudicated special education hearing).

330. *See* Valverde, *supra* note 321, at 630–31 (contrasting the remedies of tuition reimbursement and compensatory education and their effects on children).

331. *See id.*

332. *Id.* at 617 ("[T]he longer a child with a disability fails to receive proper remediation, the more likely the disability may become ingrained and less responsive, or even unresponsive, to treatment.").

333. *See id.* at 612–15.

of language, cognitive, and social-emotional/behavioral disabilities and delays.[334]

Courts long have acknowledged that time is of the essence in addressing the educational needs of all children with disabilities:[335]

> [T]he sooner parents start [the cooperative process between parents and schools that results from a parent's action] and secure appropriate intervention and remedial supports after they discover or reasonably should have discovered the need for it, the better for the well-being of the child, the goals of the school district, and the relationship between the family and school administrators.[336]

They have held that a school district's failure to timely evaluate a student with a disability and provide a FAPE constitutes a FAPE denial,[337] and acknowledged the damage done to a child when the child receives an inadequate education, even for short periods of time.[338]

All students with disabilities, no matter their household income, resource levels, and parental involvement or ability, are entitled to the same rights under the IDEA.[339] However, federal courts nationwide have acknowledged the presence of an unintended disparate impact of the Act on families without means. For example, the Ninth Circuit, in discussing the adverse effects of permitting informal observations of district professionals to override the statutory duty to evaluate students with autism, noted these effects "would be felt most heavily by children from disadvantaged families without the sophistication or resources to obtain outside professional opinions."[340] Similarly, the D.C. Circuit recognized that "[w]hile some parents may seek

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334. Sally E. Shaywitz et al., *The Education of Dyslexic Children from Childhood to Young Adulthood*, 59 ANN. REV. PSYCH. 451, 463, 467 (2008) (finding that windows exist for the development of certain skills that, if missed, make it much harder for a child to learn the skills, let alone master them); *see also* Allyson P. Mackey et al., *Environmental Influences on Prefrontal Development*, *in* PRINCIPLES OF FRONTAL LOBE FUNCTION 145, 146 (Donald T. Stuss & Robert T. Knight eds., 2nd ed. 2013).

335. *See, e.g.*, Spiegler v. District of Columbia, 866 F.2d 461, 466–67 (D.C. Cir. 1989) ("The Act's requirement of periodic and individualized assessments of each handicapped child evinces a recognition that children, particularly young children, develop quickly . . . .").

336. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015) (emphasis added).

337. *See, e.g.*, Blackman v. District of Columbia, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (holding the district's failure to provide a timely hearing for months after the forty-five-day timeline expired "crosse[d] the line from process to substance" and caused irreparable injury).

338. *Id.*; Issa v. Sch. Dist. Of Lancaster, 847 F.3d 121, 142 (3d Cir. 2017); Plyler v. Doe, 457 U.S. 202, 221 (1982).

339. Z.B. v. District of Columbia, 888 F.3d 515, 525 (D.C. Cir. 2018).

340. Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1122 (9th Cir. 2016).

out private evaluations and bring them to the school's attention . . . not all parents have the resources or expertise to obtain an accurate evaluation."[341] In the decades preceding *J.M.*, the Third Circuit took active steps to address such disparities, including by adopting compensatory education as a remedy for those who cannot front the costs of an appropriate education and seek reimbursement,[342] and by holding that a child's entitlement to special education does not depend on parental vigilance because some parents may not be "sufficiently sophisticated to comprehend the problem."[343] Despite these judicial attempts to create a more equitable special education system, the Act's unequal impact on families without means persists. Decisions like *L.J.*, *Lisa M.*, and *J.M.* fly in the face of efforts to remediate the unbalanced playing field for low-income and indigent children by widening the evidentiary gap, increasing their disadvantage, and further reducing their opportunity to perform commensurate with their non-disabled and/or wealthier peers. These decisions leave the most vulnerable children the most at risk of harm.

That summary exclusion of post-hoc evidence in child find and eligibility disputes violates the language, intent, and purpose of the IDEA, U.S. Supreme Court and circuit-level precedent, due process, and principles of fundamental fairness is clear. It also permits school districts to escape liability for wrongdoing under the Act, defying both logic and common sense. A closer look at the Third Circuit's *J.M.* decision helps to contextualize and illustrate the adverse effects of barring post-hoc evidence from consideration on children.

IV. THE CASE OF *J.M.*: A SNAPSHOT OF THE SNAPSHOT RULE'S CONSEQUENCES IN PRACTICE

The case of *J.M.* illustrates the unjust outcomes for and harmful effects on children resulting from courts' summary exclusion of post-hoc evidence in child find and eligibility matters. Recall the matter concerned a young boy, C.M., who, upon entering the public schools for first grade in September 2015, presented with severe behavioral issues.[344] In response, the district implemented some behavioral interventions and academic supports.[345] At or

341. *Z.B.*, 888 F.3d at 525 (citation omitted).
342. *See* Lester H. *ex rel.* Octavia P. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990).
343. *See* M.C. *ex rel.* J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).
344. *See* J.M. v. Summit City Bd. Of Educ., 39 F.4th 126, 131 (3d Cir. 2022).
345. *See id.* at 131–32.

around the same time, C.M.'s parents financed a private neuropsychological evaluation of their son.[346] The psychologist who performed the neuropsychological testing diagnosed C.M. with learning and language disabilities[347] and issued "rule-out" diagnoses for both autism and ADHD.[348] In her report, she noted that "'[a]ll areas of deficiency' could be subsumed under autism" and "recommended further evaluations" and behavioral and language arts supports.[349] C.M.'s parents provided the report to the district and requested an initial evaluation for special education and related services, to which the district agreed.[350]

The district conducted multiple assessments of C.M.,[351] but did not assess him in all areas of suspected disability (based on the rule-out diagnoses) by performing a medical assessment for autism or ADHD,[352] as New Jersey special education regulations require for IDEA eligibility due to autism or other health impairment.[353] C.M.'s parents paid for a private occupational therapy evaluation and neuropsychological supplemental assessment.[354] The

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346. *See id.*

347. *Id.* at 132.

348. *See id.* The Third Circuit correctly states that C.M. was given "rule-out" diagnoses for both autism and ADHD whereas the ALJ incorrectly noted that the psychologist had "ruled out ADHD and autism Spectrum Disorder." *Compare id.*, *with* J.M., N.J. OAL Dkt. No. EDS 10588-16, at 13 (Oct. 12, 2018). However, the *J.M.* court defined "rule out" as "meaning that while [the psychologist] did not diagnose those conditions, she could not rule them out either." *J.M.*, 39 F.4th at 132. Contrastingly, the Third Circuit, in a non-IDEA matter, previously defined "rule-out diagnosis" as "evidence that [the patient] may meet the criteria for that diagnosis, but [the doctors] *need more information* to rule it out." United States v. Grape, 549 F.3d 591, 593 n.2 (3d Cir. 2008) (emphasis added) (adopting expert witness testimony defining the term); *see also* Hansen *ex rel.* J.H. v. Republic R-III Sch. Dist., 632 F.3d 1024, 1027 n.3 (8th Cir. 2011) (quoting expert testimony stating that a rule-out diagnosis "does not mean the person does not have the disorder . . . it means there's a very good likelihood the person has the disorder").

349. J.M. v. Summit City Bd. of Educ., No. 19-00159, 2020 WL 6281719, at *3 (D.N.J. Oct. 27, 2020) (citing the neuropsychological report).

350. *See J.M.*, 39 F.4th at 133.

351. *Id.*; *see J.M.*, 2020 WL 6281719, at *3 (noting that the social assessment relied on records, parent and teacher interviews, and observations; the psychological evaluation relied upon records, a student interview and observations; the occupational therapy assessment relied on observations and teacher reports; and the physical therapy assessment relied on a "physical assessment" but made no mention of formal testing); *see also J.M.*, 39 F.4th at 134 n.2 (stating that the speech and language therapist performed the Comprehensive Assessment of Spoken Language and the Language Processing Test Elementary-3 assessments).

352. *See J.M.*, 39 F.4th at 142–43.

353. *See* N.J. ADMIN. CODE § 6A:14-3.5(c)(2), (9) (requiring medical and speech and language assessments for the "autism" classification and a medical assessment for the "other health impairment" classification used for students with ADHD).

354. *See J.M.*, 39 F.4th at 131, 133.

court found C.M. made "meaningful progress and the interventions were successful" while he was undergoing the initial evaluation.[355]

The district held an eligibility meeting in February 2016, midway through C.M.'s first-grade year.[356] According to the court, all *fourteen district members* of the Child Study Team found C.M. ineligible for special education.[357] C.M.'s parents disagreed with the eligibility determination and, thereafter, financed a private speech and language evaluation of C.M. and continued to have him evaluated and monitored by the private psychologist.[358] While these evaluations were ongoing, C.M.'s parents filed for due process against the district in May 2016, alleging child find violations, challenging C.M.'s eligibility determination, and claiming denial of a FAPE.[359] After the district's February 2016 ineligibility determination but before the July 2017 commencement of the due process hearing, C.M.'s parents received the new IEE reports and provided them to the district.[360] The reports revealed ongoing "struggles in reading, writing and behavior," and the neuropsychological evaluation diagnosed C.M. with autism, ADHD-Combined Type, and specific learning disabilities.[361] Upon receipt of the reports, the district arranged and paid for its own psychiatric (i.e., medical) assessment of C.M., which confirmed the ADHD and autism diagnoses.[362] In April 2017, fourteen months after the district initially had denied C.M. eligibility, it "determined that, based on the autism diagnosis, C.M. needed special education and related services," found him IDEA eligible, and developed an IEP.[363]

At the due process hearing, C.M.'s parents introduced into evidence the private (independent) neuropsychological and speech and language evaluation reports obtained after the initial eligibility determination but before the hearing to show that the district's initial "ineligibility determination was manifestly unreasonable" and denied C.M. a FAPE.[364] Citing to the Third Circuit's decision in *Fuhrmann* and the Ninth Circuit's decision in *Baquerizo v. Garden Grove Unified School District*, the ALJ

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355. *Id.* at 133.

356. *See id.* at 135.

357. *See id.*

358. *Id.*

359. *See* J.M., N.J. OAL Dkt. No. EDS 10588-16, at 23 (Oct. 12, 2018).

360. *See J.M.*, 39 F.4th at 135.

361. J.M. v. Summit City Bd. Of Educ., No. Civ. 19-00159, 2020 WL 6281719, at *4 (D.N.J. Oct. 27, 2020).

362. *J.M.*, 39 F.4th at 135.

363. *Id.*

364. *See id.* at 135, 144.

applied the Snapshot Rule to exclude the reports from consideration because the district "did not have this information available at the time of the initial determination" finding C.M. ineligible.[365] The ALJ refused to accord any weight to the testimony of C.M.'s private speech and language expert because it was based upon two evaluation reports that post-dated the initial eligibility meeting, and similarly accorded no weight to the private psychologist's testimony concerning the July/August 2016 and January 2017 neuropsychological reports.[366] In October 2018, nearly two and a half years after C.M.'s parents filed their due process hearing request, the ALJ held in favor of the district, concluding the district had met its child find obligations, considered all information it had available at the time of the eligibility meeting, and properly found C.M. ineligible under the IDEA.[367]

On appeal, the district court granted summary judgment to the school district, thereby affirming the administrative decision, including exclusion of the post-hoc evaluation reports.[368] Notably, the district court stated that neither the Third Circuit nor the Supreme Court previously had opined on whether post-hoc evidence should be considered when reviewing a district's eligibility determination.[369] Relying upon the Fifth Circuit's decision in *Lisa M.*, the district court reasoned there was "good reason *not* to extend *Susan N.*" to the instant matter because the "IEP appropriateness inquiry . . . considers staff implementation and student performance over a period of time whereas eligibility is a snapshot of the student's condition at the time of the eligibility determination."[370] The court held that post-hoc evidence "*relating to C.M.'s alleged disabilities* that post-dated the February 2016 meeting (namely reports from [C.M.'s speech and language expert and neuropsychologist]), *which the ALJ did not consider*," was irrelevant to the

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365. *See* J.M., N.J. OAL Dkt. No. EDS 10588-16, at 23–24 (Oct. 12, 2018) (holding courts must employ the Snapshot Rule, "which instructs [the court] to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP" (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir. 2016))). *Baquerizo* concerns the application of the Snapshot Rule in IEP matters. *See Baquerizo*, 826 F.3d at 1182–84.

366. *See* J.M., N.J. OAL Dkt. No. EDS 10588-16, at 17–18 (Oct. 12, 2018).

367. *Id.* at 25.

368. J.M. v. Summit City Bd. Of Educ., No. Civ. 19-00159, 2020 WL 6281719, at *1, *7 (D.N.J. Oct. 27, 2020) ("[T]he ALJ did not err in focusing on the information available in February 2016 in connection with the eligibility determination.").

369. *See id.* at *7 ("Susan N.'s approval of later-acquired evidence is limited to evaluating the reasonableness and efficacy of an IEP.").

370. *Id.* (emphasis added) (citing Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 215 (5th Cir. 2019)).

child find and eligibility issues before the ALJ,[371] and that the school district did not violate child find and made no error finding C.M. ineligible for special education.[372] C.M.'s parents appealed the decision.[373]

As stated before, the Third Circuit issued an ambiguous and contradictory holding.[374] At the very least, the Court held that courts *may* exclude post-hoc evidence offered to prove a child find breach from consideration, and, at most, it held that post-hoc evidence is irrelevant and must be excluded from consideration.[375] Regardless of which holding best reflects the Court's intention, the Third Circuit's opinion summarily restricts, permissively or automatically, courts' consideration of evidence that often is critical for children with disabilities and their parents to prove a school district violated the Act and denied the child a FAPE.

Third Circuit Judge Greenaway's impassioned dissent argued the majority applied an incorrect standard and committed error.[376] He emphasized the importance of information regarding a child's capabilities,[377] and found that the IEEs in question "could have been relevant in determining whether the school district satisfied its duty" under the Act and aid in the provision of a FAPE.[378] Judge Greenaway added, "This is especially true where expert reports are post-hoc . . . because they are prepared when a child's challenges persist and may be more comprehensive . . . relative to the information upon which the initial eligibility determination was based."[379] In addition, he noted that the evidence existing at the time of the eligibility determination "may be cursory or under-developed, rendering families unable to demonstrate the school district's breach," and this "could prove fatal to the entire claim."[380] Despite these arguments, the *J.M.* majority adopted a rigid and extreme version of the Snapshot Rule that gives courts "carte blanche" to summarily exclude post-hoc evidence from consideration in the child find and eligibility contexts.[381]

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371. *See id.* (emphasis added).

372. *See id.* at *9.

373. *See* J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 126 (3d Cir. 2022).

374. *See supra* notes 214–215 and accompanying text.

375. *See id.*; *see also J.M.*, 39 F.4th at 144–45.

376. *See J.M.*, 39 F.4th at 150–51 (Greenaway, J., dissenting).

377. *See id.* at 148 ("Information regarding a child's capabilities is key to determining whether what child qualifies as disabled and what constitutes an appropriate educational plan.").

378. *Id.*

379. *Id.*

380. *Id.* at 150.

381. *See id.* at 149.

The *J.M.* facts provide a vehicle for understanding the unjust outcomes and adverse consequences resulting from bars on courts' consideration of post-hoc evidence in child find and eligibility matters and underscore the need for a new evidentiary standard to level the playing field. To start, consider the causes of power imbalances that result in districts having a natural advantage over parents in special education disputes. In *J.M.*, the district had, as employees or contractors, many professionals with specialized expertise and experience in various special education-related fields, including teachers, social workers, school psychologists, speech and language specialists, etc.[382] In performing C.M.'s assessment for eligibility, the district had ready access to these professionals and they had ready access to C.M.[383] Further, the district created, collected, and maintained all of the school records on C.M. except for the IEEs secured by his parents privately at their own expense.[384] C.M.'s parents were fortunate in that they were able to finance an IEE of their son prior to the initial eligibility meeting as well as additional IEEs following the meeting.[385] They also are native English speakers, highly educated, knowledgeable about the special education process, and were accompanied by professionals with special education experience and expertise, namely C.M.'s private psychologist and a non-attorney advocate, at the initial eligibility meeting.[386] Yet, despite all these resources, district staff outnumbered C.M.'s parents and, consequently, overpowered, i.e., outvoted, them at the initial eligibility meeting with a ratio of fourteen district professionals to four.[387] Such ratios, and even greater ones, are not uncommon in meetings at which significant educational decisions are made for children with disabilities.[388]

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382. *See* J.M., N.J. OAL Dkt. No. EDS 10588-16, at 3–9, 14–16 (Oct. 12, 2018) (describing testimony from four district employees who specialize in special education and served as expert witnesses for the district at the administrative hearing); *see also J.M.*, 39 F.4th at 134 (stating the district "designated . . . fourteen staff members and other professionals from multiple disciplines" to assess C.M. for IDEA eligibility).

383. *See J.M.*, 39 F.4th at 134.

384. *See* J.M., N.J. OAL Dkt. No. EDS 10588-16, at 26–28 (Oct. 12, 2018) (listing exhibits submitted as evidence at the due process hearing).

385. *See J.M.*, 39 F.4th at 131–32, 135 (describing the IEEs financed by C.M.'s parents).

386. Email from Thomas O'Leary, Esq., attorney representing the parents in the civil action, to Author (Oct. 16, 2023) (on file with author).

387. *See J.M.*, 39 F.4th at 134–35.

388. This statement is based upon the Author's twenty plus years of experience representing children with disabilities in Child Study and IEP team meetings. *See, e.g.*, Sabrina Axt, *An Attorney Parent's Guide to Surviving the Special Education Process*, CONTRA COSTA L., July 2022, at 22, 24, https://www.cccba.org/article/an-attorney-parents-guide-to-surviving-the-special-education-process/#author [https://perma.cc/EFU7-XPZE] (describing IEP eligibility

Next, consider the IDEA's child find process. The district did not initiate a special education evaluation of C.M. until his parents provided a copy of the parent-financed independent neuropsychological evaluation, despite the district's affirmative duty to locate, identify, and evaluate all potentially eligible children.[389] Additionally, the district did not perform a medical (i.e., psychiatric) assessment to determine the presence of autism and ADHD, despite its awareness of the "rule-out" diagnoses by the independent psychologist, until C.M.'s parents paid for *additional* IEEs, diagnosing C.M. with both disabling conditions.[390] Only after confirming the diagnoses did the district finally find C.M. eligible.[391] If C.M.'s parents had not had the ability to finance IEEs to initiate the evaluation process and diagnose C.M., he very likely would have remained ineligible and without a FAPE for many months or years.

Of course, C.M.'s parents could have requested an IEE at public expense;[392] and if their financial situation were different, they would have had to request one from the district (unless C.M. had health insurance that covered the evaluation). However, in order to obtain a publicly funded IEE, C.M.'s parents would have had to disagree with a district evaluation;[393] and since the eligibility meeting at which the evaluations were reviewed was the "snapshot" in time where the dispute arose, any IEE performed thereafter would have been post-hoc evidence and excluded as irrelevant under *J.M.* Indeed, the only way to ensure a court will consider an IEE under *J.M.* is if his parents anticipated and, in fact, assumed a dispute would arise during the child find and/or eligibility stages and then expended significant private resources to obtain outside evaluations *in advance of a potential dispute*.[394]

C.M.'s parents also had the financial resources and wherewithal to secure C.M.'s placement in a private school for students with disabilities while the

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meetings as "meeting[s] where parents are always outnumbered"); *IEP Practical Suggestions*, ARIZ. DEP'T OF EDUC., https://www.azed.gov/specialeducation/resources/iep-practical-suggestions [https://perma.cc/3CJY-EUPA] ("Parents are usually outnumbered at IEP meetings . . . .").

389. *See J.M.*, 39 F.4th at 133; *see also* 20 U.S.C. § 1412(a)(3)(A).

390. *See J.M.*, 39 F.4th at 135.

391. *Id.*

392. 34 C.F.R. § 300.502 (2023).

393. § 300.502(b)(1).

394. C.M.'s parent would not have been able to obtain a publicly funded IEE prior to the initial eligibility meeting because, at that time, the district had not yet performed any evaluation or refused to evaluate C.M. (decisions with which his parents could have disagreed). *See id.*

dispute wove its way through the courts.[395] This enabled C.M. to receive appropriate special education programming and services during much of the dispute resolution process. If C.M.'s parents had won the civil action, they could have received reimbursement for private school expenses as well as the IEE costs.[396] However, if they, like most parents, had lacked the finances to "front" the cost of an appropriate education, C.M. would have remained in inappropriate educational programs for years with compensatory education as the sole available recourse, and that is only if they actually succeeded in the Herculean task of demonstrating the district breached child find, wrongfully denied eligibility, and denied a FAPE *without the benefit of post-hoc evidence*. For C.M., remaining in an inappropriate educational program with no special education supports during the litigation process very well could have had substantial—and potentially lifelong—adverse effects on his development, education, mental health, confidence, and the overall well-being of his family.[397]

The lesson learned by school districts in the Ninth, Fifth, and Third Circuits from the *Lisa M.*, *L.J.*, and *J.M.* decisions, respectively, is that the less information a district gathers about a child at the child find and eligibility stages, the easier it is for the district to argue that the information was not available at the time it made the decision in dispute, and the harder it is for parents to prove that a child find or eligibility breach occurred. And the lesson learned by parents is that although the Act, Supreme Court precedent, and Congress mandate that children have IDEA and procedural due process rights and safeguards—which are essential to balance the scale and level the playing field between parents and districts in special education matters—courts can restrict these rights and safeguards regardless of the resultant harm to children. To counter these dangerous and destructive lessons and protect the Act's beneficiaries as Congress intended, a new standard for the consideration of post-hoc evidence must be implemented.

V. AN ALTERNATIVE APPROACH FOR CONSIDERING POST-HOC EVIDENCE IN CHILD FIND AND ELIGIBILITY MATTERS

The Snapshot Rule, as initially developed in the First Circuit, provided certain parameters for the use of, and weight accorded to, evidence of a

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395. *See J.M.*, 39 F.4th at 135 (stating that C.M.'s parents enrolled him in a private school in July 2019).

396. *See id.* at 146.

397. *See* Valverde, *supra* note 321, at 605–24.

child's progress (or lack thereof) in special education IEP disputes.[398] The Ninth, Fifth, and Third Circuits have swung the Snapshot Rule pendulum so far in the opposite direction from the rule's original intention that children are all but prevented from putting on an affirmative case to demonstrate that a child find breach or eligibility violation occurred, and thereby denied their IDEA rights, safeguards, and remedies.[399] Thus, a new rule for post-hoc evidence consideration is warranted.

Consistent with the IDEA's broad remedial mandate, this Article proposes that courts consider post-hoc evidence with few limitations in child find and eligibility matters and determine how much weight to give such evidence on a case-by-case basis, restoring to judges needed flexibility and discretion. In civil actions, as long as the post-hoc evidence is relevant, not duplicative, and its probative value is not outweighed by its prejudicial effect,[400] the court must admit the evidence and accord it the weight the court deems appropriate, with one caveat—to prevent Monday morning quarterbacking, courts should not *automatically* deem post-hoc evidence dispositive of the issue and should refrain from deciding these matters *exclusively* in hindsight. In administrative due process hearings, all relevant post-hoc evidence should be admissible except as otherwise provided by governing rules of court, and courts must consider the evidence to ensure that a complete factual record is developed and a proper judgment is issued.[401] This proposal aligns with the IDEA's language, intent, and purpose, Supreme Court precedent, procedural due process, and fundamental fairness principles.

Limited scholarship exists on the Snapshot Rule and consideration of post-hoc evidence; articles on the subject have focused predominantly on the rule's application in the IEP context or, more generally, the admission of additional evidence in IDEA matters. A few scholars advocate for significant restrictions on the admission of additional evidence, including post-hoc evidence, arguing that the current scheme "allows too much latitude to the courts resulting in a review system that is procedurally lax, cumbersome and inefficient."[402] These scholars argue for a "strict standard for admission of additional evidence at the judicial review stage of IDEA proceedings" to promote judicial economy and administrative efficiency,[403] and to conserve

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398. *See* discussion *supra* Section II.B.
399. *See* discussion *supra* Part III.
400. *See* FED. R. EVID. 401, 403.
401. *See* Krahmal et al., *supra* note 111, at 219–20.
402. *Id.* at 216; Clark, *supra* note 103, at 823. *But see* Fan, *supra* note 20, at 1543–47.
403. Krahmal et al., *supra* note 111, at 222.

"increasingly scarce judicial educational resources."[404] In practice, one scholar urges a traditional relevance analysis followed by a requirement that the party seeking to admit additional evidence provide "some solid justification" for its admission, including "a detailed proffer which identifies the nature of the evidence, explains why the evidence was not presented at the due process hearing, and why it would be relevant."[405] Another proposes the "adopt[ion] and enforce[ment of] a strong presumption against additional evidence" whereby any motion to admit such evidence should be denied "unless the movant provides a solid, particularized, and compelling justification for such admission."[406] Notably, none of these scholars consider the conflicts and concerns that arise with summary exclusion of post-hoc evidence discussed in this Article, including the conflict with parents' right to an IEE, and the adverse effects of a strict standard on children already disadvantaged by the uneven playing field and by obstacles grounded in poverty or relative impecunity.

Other special education scholars and practitioners may advocate for an evidentiary standard that follows the precedent set forth in *Susan N.*[407] Recall that in *Susan N.*, the Third Circuit held courts must "exercise particularized discretion" and consider evidence that is "relevant, non-cumulative, and useful in determining whether Congress' goal has been reached for the child involved."[408] This holding is rooted in deference to the Supreme Court's *Rowley* warning that courts not "substitute their own notions of sound educational policy for those of the school authorities they review,"[409] and the Third Circuit's desire to avoid "second-guessing" school district decisions "with information to which [the school district] could not possibly have had access" when it made those decisions.[410] However, as explained earlier, the *Rowley* warning is based upon and balanced by two key presumptions: First, that school districts are acting in accordance with the IDEA and ensuring that the rights of children with disabilities and their parents are protected; and second, that parents are involved and participating in their child's special education process.[411] Like *Rowley*, three presumptions form the foundation for and serve as counter-weights in the *Susan N.* decision: First, the school

404. *Id.*
405. Clark, *supra* note 103, at 840–41.
406. Krahmal et al., *supra* note 111, at 222–23.
407. *See, e.g.*, Fan, *supra* note 20, at 1540.
408. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 760 (3d Cir. 1995).
409. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).
410. *Susan N.*, 70 F.3d at 761–62.
411. *See Rowley*, 458 U.S. at 209.

district will use its expertise and judgment wisely and properly when making decisions of critical import to the life of a child with a disability (this is the underlying rationale for courts' deference to school authorities in such decision-making); second, the district will adhere to the IDEA and corresponding regulations, and will ensure the rights of students with disabilities and their parents are protected, including provisions for parental participation and district-parent collaboration in the special education process; and third, the district "could not possibly have had access" to the post-hoc evidence in question at the time the decision was made.[412] Based upon these presumptions, the Third Circuit in *Susan N.* limited consideration of post-hoc evidence to determining the r*easonableness* of the district's decision because it would be unfair to have a rule that financially penalizes districts for a decision that turns out to be inadequate in hindsight even though it was appropriate when it was made.[413] Provided the *Susan N.* presumptions have been met, the Third Circuit's holding that courts "first evaluate proffered evidence before deciding to exclude it," for the due weight requirement does not mean the court "arbitrarily or summarily could exclude additional evidence submitted by a party in pursuit of that deference"[414] makes perfect sense.

Importantly, however, there are many instances in which the presumptions are not met, yet courts still apply the *Susan N.* Snapshot Rule. Examples include where school districts do not use their judgment wisely or follow the law, and/or parents are not involved in or are prevented, intentionally or unintentionally, from participating in the special education process of their child. Without post-hoc evidence, parents seldom can prove the presumption is false. In addition, there are times where school districts *could, should, and would have had access* to relevant, later-acquired information and evidence had they acted properly in accordance with the IDEA, but the only way for parents to demonstrate this proposition is with post-hoc evidence. Under these circumstances, it would be equally, if not more, unfair to deprive a child with a disability of a fair hearing and remedy by disallowing courts' consideration of post-hoc evidence that is essential to prove wrongdoing where the district acted inappropriately or unreasonably. No child should be denied due process and an appropriate and complete remedy due to a district's failure, inadvertent or otherwise, to obtain information *that it should have had* and, in many cases, *could have and would have had* if it had acted

412. *See Susan N.*, 70 F.3d at 762.
413. *See id.*
414. *Id.* at 759.

properly, when deciding, for example, whether to evaluate a student, which evaluations to perform, if the evaluations were performed properly, and if a child is IDEA eligible. Moreover, no court should permit this to occur.

Courts, therefore, must balance the IDEA's purpose, specifically to ensure children with disabilities and their parents have available a FAPE and their procedural rights are protected, against the desire to protect districts from undue burdens. The Ninth, Fifth, and Third Circuits disrupt this balance by protecting districts through the exclusion of post-hoc evidence at the expense of safeguarding children's IDEA rights and providing them with a FAPE. As explained above, post-hoc evidence often is the predominant, if not the only, proof that a district acted improperly or unreasonably under the Act.[415] In allowing, or worse requiring, courts to summarily exclude this evidence, these Circuits bend the scale wholly in favor of school districts, causing significant harm to the very children whom the Act seeks to protect.

A rule that requires courts to consider post-hoc evidence without restriction other than those provided in the governing court rules of evidence, with the caveat that child find and eligibility matters should not be decided *exclusively* in hindsight and post-hoc evidence should not *automatically* be deemed dispositive in determining the presence of a statutory violation, restores the balance needed. To understand the practical application of such a rule, consider once more the *J.M.* facts. The IEEs of C.M., if considered by the courts, *could have* revealed important information demonstrating the district did not perform the appropriate types of evaluations; and that had the district performed the proper evaluations per New Jersey special education regulations, it would have had the information and data needed to show C.M. actually was disabled under the Act. The IEEs *could have* shown that C.M. should have been found eligible for special education based on his disabilities and needs at the time of the first eligibility meeting or, at least, sometime between that first meeting and fourteen months later when the district finally classified him, resulting in a remedy to compensate him for any FAPE deprivation. Expert testimony regarding post-hoc evidence *could have* helped answer questions and fill in blanks about C.M.'s presentation of his disabilities, the testing performed that resulted in autism and ADHD diagnoses, and whether such conditions should have been identified earlier by the district and how. Requiring the ALJ and reviewing courts to consider this post-hoc evidence does not mean that C.M. and his parents would have won their case. To the contrary, limits on deeming such evidence automatically dispositive and on making decisions exclusively in hindsight

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415. *See* discussion *supra* Part V.

prevent a de novo hearing while simultaneously allowing the evidence to be heard and the judge to accord it the weight it is due. The proposed standard, however, would have given C.M.'s parents a means to hold the district accountable for its actions during the child find and eligibility processes by sealing the liability escape hatch. It also would have given C.M.'s parents, and others similarly situated, the opportunity to demonstrate that the district did not use its judgment wisely or follow the law; that the parents were not involved in and/or were prevented from participating in the special education process of their child; and/or that the school district *could, should, and would have* had access to relevant, later-acquired information and evidence at the time of the snapshot had it acted in accordance with the IDEA. Courts' broad consideration of post-hoc evidence provides parents at least a fighting chance to demonstrate that a child find or eligibility breach occurred and resulted in a FAPE violation, reducing parent disadvantage and balancing the scale by leveling the dispute resolution playing field at least somewhat. Until courts adopt the recommended post-hoc evidence standard, a statutory and/or regulatory[416] amendment is needed to define evidence and "additional evidence" as including post-hoc evidence in the child find and eligibility contexts.

VI. CONCLUSION

The seemingly technical issue of what evidence may be considered in cases alleging violations of the IDEA has major implications for the goals of the statute and students' ability to receive the FAPE they are promised by federal law. The Ninth, Fifth, and Third Circuits' adoption of a stringent Snapshot Rule in *L.J.*, *Lisa M.*, and *J.M.*, respectively, reads restrictions into the IDEA where none exist, weakening children's rights and protections. These rulings offer prime examples of Congress giving—through legislation—and courts taking away.

An evidentiary standard that allows courts to consider post-hoc evidence broadly in child find and eligibility matters, limited only by statute and the evidentiary rules of the reviewing tribunal, while preventing courts from *automatically* deeming post-hoc evidence dispositive of the issue in dispute and judging such matters *exclusively* in hindsight, is necessary to safeguard the due process rights of and remedies for children with disabilities

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416. *See, e.g.*, Schisler v. Sullivan, 3 F.3d 563, 570 (2d Cir. 1993) (permitting federal agencies to reset the law by promulgating administrative regulations when they disagree with circuit court interpretations).

wrongfully denied a FAPE. The proposed standard will permit children to receive the full benefit of the special education rights, protections, and remedies they are accorded under the IDEA, including timely and appropriate educational programs and services to which they are entitled and which they require to succeed. Only with implementation of such an evidentiary standard can the balance needed in the IDEA dispute resolution process be achieved.